122 FERC ¶ 61,245
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;
Suedeen G. Kelly, Marc Spitzer,
Philip D. Moeller, and Jon Wellinghoff.

North American Electric Reliability Council, North American Electric Reliability Corporation	Docket No. RR06-1-012
Delegation Agreement Between the North American Electric Reliability Corporation and Texas Regional Entity, a division of ERCOT	Docket No. RR07-1-002
Delegation Agreement Between the North American Electric Reliability Corporation and Midwest Reliability Organization	Docket No. RR07-2-002
Delegation Agreement Between the North American Electric Reliability Corporation and Northeast Power Coordinating Council, Inc.	Docket No. RR07-3-002
Delegation Agreement Between the North American Electric Reliability Corporation and Reliability*First* Corporation	Docket No. RR07-4-002
Delegation Agreement Between the North American Electric Reliability Corporation and SERC Reliability Corporation	Docket No. RR07-5-002
Delegation Agreement Between the North American Electric Reliability Corporation and Southwest Power Pool, Inc.	Docket No. RR07-6-002
Delegation Agreement Between the North American Electric Reliability Corporation and Western Electricity Coordinating Council	Docket No. RR07-7-002

Delegation Agreement Between the North American Electric Reliability Corporation and Florida Reliability Coordinating Council — Docket No. RR07-8-002

North American Electric Reliability Corporation and Western Electricity Coordinating Council — Docket No. RR08-2-000

ORDER ADDRESSING REVISED DELEGATION AGREEMENTS

(Issued March 21, 2008)

C O N T E N T S

1. In this order, we address two filings submitted by the North American Electric Reliability Corporation (NERC). First, on October 30, 2007, NERC submitted a filing (NERC's October 30 Filing) in response to an April 19, 2007 Order in which the Commission accepted NERC's *pro forma* Delegation Agreement and eight individual Delegation Agreements between NERC and each Regional Entity.[1] The *April 19 Order* also identified areas of concern and required modifications to the *pro forma* and individual Delegation Agreements. Second, on November 2, 2007, NERC and the Western Electricity Coordinating Council (WECC) filed proposed revisions to the WECC bylaws (WECC Bylaws Filing).

2. For the reasons discussed below, we accept NERC's October 30 Filing, to become effective 15 days after the date of this order. In addition, we accept the WECC Bylaws Filing to become effective conditioned on subsequent membership approval. We also direct certain modifications to the *pro forma* Delegation Agreement, individual Delegation Agreements, and the WECC Bylaws Filing, to be addressed by NERC and its Regional Entities in a filing to be made within 120 days of the date of this order.

I. <u>Background</u>

3. In July 2006, the Commission issued an order, pursuant to section 215 of the Federal Power Act (FPA),[2] certifying NERC as the Electric Reliability Organization (ERO).[3] Pursuant to FPA section 215(e)(4), the ERO is authorized to delegate authority to a Regional Entity for the purpose of proposing Reliability Standards to the ERO and enforcing mandatory, Commission-approved Reliability Standards. In its ERO certification application, NERC submitted a *pro forma* Delegation Agreement. In the

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[1] *North American Electric Reliability Corp.*, 119 FERC ¶ 61,060 (*April 19 Order*), *order on reh'g*, 120 FERC ¶ 61,260 (2007) (*Delegation Agreements Rehearing Order*). The Regional Entity Delegation Agreements went into effect on June 5, 2007. *See Delegation Agreement Between the North American Electric Reliability Corp. and Texas Regional Entity, a division of ERCOT*, 119 FERC ¶ 61,232 (2007).

[2] 16 U.S.C.A. § 824o (Supp. V 2005).

[3] *North American Electric Reliability Corp.*, 116 FERC ¶ 61,062 (*ERO Certification Order*), *order on reh'g and compliance*, 117 FERC ¶ 61,126 (2006), *order on compliance*, 118 FERC ¶ 61,030, *order on clarification and reh'g*, 119 FERC ¶ 61,046 (2007).

ERO Certification Order, the Commission directed NERC to further develop the *pro forma* Delegation Agreement and resubmit it with individual agreements.

4. On November 29, 2006, NERC submitted a revised *pro forma* Delegation Agreement and eight individual Regional Entity Delegation Agreements.[4] As noted above, the Commission, in the *April 19 Order*, accepted both the *pro forma* Regional Entity and individual Delegation Agreements. In accepting NERC's filings, the *April 19 Order* also identified areas of concern and, where necessary to provide greater uniformity and clarity, required modifications to the *pro forma* and individual Delegation Agreements, the exhibits to these agreements, and to the Compliance Monitoring and Enforcement Program (CMEP). The *April 19 Order* required that these modifications be submitted to the Commission within 180 days of the date of the Commission's order.

II. NERC's October 30 Filing and the WECC Bylaws Filing

5. NERC's October 30 Filing consists of: (i) an amended and restated *pro forma* Delegation Agreement; (ii) a revised *pro forma* CMEP document, which includes revisions to the NERC hearing procedures; (iii) eight amended and restated Delegation Agreements (including revised bylaws and standards development procedures for each Regional Entity); and (iv) revisions to the NERC Rules of Procedure. NERC states that these revisions comply with the requirements of the *April 19 Order* and also include additional proposed revisions, primarily addressing the NERC hearing procedures.

6. NERC states that it substantially revised the NERC hearing procedures and related investigative matters addressed by the CMEP. It explains that these provisions respond to specific directives of the *April 19 Order* as well as the broader concerns expressed by the Commission regarding the need for specificity and uniformity. NERC points out that while its hearing procedures, as originally filed, contained approximately six pages of text, the NERC hearing procedures, as revised, are over 33 pages long. NERC adds that because hearings are now pending before its Regional Entity hearing bodies, it is important that the NERC hearing procedures be implemented without delay.

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[4] The eight Regional Entities are: Texas Regional Entity, a Division of the Electric Reliability Council of Texas (TRE); Midwest Reliability Organization (MRO); Northwest Power Coordinating Council, Inc. (NPCC); Reliability*First* Corporation (RFC); SERC Reliability Corporation (SERC); Southwest Power Pool, Inc. (SPP); WECC; and Florida Reliability Coordinating Council (FRCC).

7. The WECC Bylaws Filing consists of amendments addressing: (i) WECC's performance of its delegated functions as a Regional Entity under FPA section 215, including amendments that enhance WECC's ability to function effectively as an Interconnection-wide Regional Entity; (ii) references that are out of date or inconsistent with WECC's current status and functions; and (iii) general corporate matters.

III. Notice of Filings and Comments

8. Notice of the October 30 Filing was published in the *Federal Register*, 72 Fed. Reg. 65,717 (2007), with interventions and protests due on or before December 4, 2007. Notices of intervention and motions to intervene were timely filed by TRE; ERCOT; MRO; RFC; NPCC; the New York Independent System Operator, Inc. (New York ISO); American Public Power Association (APPA); Edison Electric Institute and the National Rural Electric Cooperative Association (EEI/NRECA); Transmission Agency of Northern California (TANC); Transmission Access Policy Study Group (TAPS); Silicon Valley Power (Silicon Valley); Modesto Irrigation District (Modesto); and Georgia Systems Operations Corporation (Georgia Coop). Protests and comments were filed by MRO; RFC; APPA; New York ISO; EEI/NRECA; TANC; TAPS; Silicon Valley; and Georgia Coop. On December 14, 2007, NERC, on behalf of itself and the eight Regional Entities, filed an answer to protests.

9. Notice of WECC's Bylaw Filing was published in the *Federal Register*, 72 Fed. Reg. 65,320 (2007), with interventions and protests due on or before December 4, 2007. Notices of intervention and motions to intervene were timely filed by Modesto, TANC, the City of Santa Clara, California (Santa Clara) and the M-S-R Public Power Agency. Santa Clara submitted comments.

IV. Discussion

A. Procedural Matters

1. NERC's October 30 Filing

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2007), prohibits an answer to a protest unless otherwise ordered by the decisional authority. We will accept NERC's answer because it has provided information that assisted us in our decision-making process.

11. NERC, in the October 30 Filing, proposes numerous revisions to the *pro forma* Delegation Agreement and its attachments that are not required by the *April 19 Order*. In the context of the substantial revisions to the hearing procedures,[5] NERC acknowledges the Commission's general policy limiting the scope of a compliance filing proceeding to the changes required for compliance with the Commission's underlying directives. However, NERC urges the Commission to consider the additional proposed revisions to the hearing procedures as preferable to piecemeal review and approval. NERC also notes that the expanded scope and additional specificity added to its proposed hearing procedures respond to the general concerns set forth in the *April 19 Order*.

12. APPA and EEI/NRECA, in response, argue that NERC's revised procedures exceed the scope of this proceeding. APPA also argues that these procedures were developed without adequate stakeholder input, contrary to the requirements of Rule 1402 of the NERC Rules of Procedure. APPA also urges the Commission to condition its acceptance of the NERC hearing procedures on a directive that NERC submit an annual report assessing the efficacy and fairness of these procedures as employed.

13. NERC, in its answer, asserts that its proposed revisions were developed through a collaborative process at the Regional Entity level. NERC adds that its Regional Entities have conferred with stakeholders regarding these revisions.

14. We agree with NERC that the *April 19 Order* expressed general concerns regarding the need for greater specificity and detail in the ERO and Regional Entity hearing process.[6] As discussed further below, the expanded scope of these procedures is a significant improvement and, although the revisions extend beyond the specific directives of the *April 19 Order*, they are responsive to the Commission's general concerns. Thus, we reject the comments of APPA and EEI/NRECA regarding the procedural status of these proposed revisions. However, we are also concerned that NERC's revisions extend well beyond NERC's proposed hearing procedures. As NERC recognizes, a compliance filing proceeding is limited to the changes required for

[5] The Compliance Enforcement Authority Hearing Process (hearing procedures) is attachment 2 to the CMEP; the revised CMEP in turn is Attachment 2 to the October 30 filing (and Appendix 4C to NERC's Rules of Procedure).

[6] *See April 19 Order*, 119 FERC ¶ 61,060 at P 146-49.

compliance with the Commission's underlying directives.[7] While, under the circumstances presented here, of the initial adoption and implementation of the Delegation Agreements, we address all of NERC's proposed revisions to the *pro forma* Delegation Agreement, extraneous matters in future compliance filings will be subject to summary dismissal.

15. Finally, we reject APPA's request that NERC be required to reassess the efficacy and fairness of the NERC hearing procedures on an annual basis. In fact, the appropriate vehicle for this review will be NERC's three-year filing (due June 2009).[8]

2. <u>The WECC Bylaws Filing</u>

16. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2007), the notices of intervention and timely, unopposed motions to intervene serve to make the entities that filed them parties to this proceeding.

17. NERC and WECC request clarification regarding the procedure and format for future filings of amendments to the WECC bylaws. They explain that, in the past, WECC has submitted bylaw changes to the Commission in a section 205 filing and the WECC bylaws have the status of a tariff. Now, pursuant to section 215(f) of the FPA and section 39.10 of the Commission's regulations,[9] the WECC bylaws also have the status of Regional Entity "rules," and revisions to such rules must be submitted for Commission approval. NERC and WECC believe that there is no apparent reason why the WECC bylaws should be treated as a tariff, and the detailed administrative requirements associated with tariff filings are administratively burdensome. Also, they contend that the section 205 tariff approach does not make sense for bylaw changes submitted on

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[7] *See AES Huntington Beach, LLC.*, at P 60 (citing *Pacific Gas and Electric Company*, 109 FERC ¶ 61,336 at P 5 (2004)); *Midwest Independent Transmission System Operator, Inc.*, 99 FERC ¶ 61,302 at 62,264 (2002); *ISO New England, Inc.*, 91 FERC ¶ 61,016 at 61,060 (2000); *Sierra Pacific Power Company*, 80 FERC ¶ 61,376 at 62,271 (1997); *Delmarva Power & Light Company*, 63 FERC ¶ 61,321 at 63,160 (1993).

[8] *See* 18 C.F.R. § 39.3(c) (2007) (requiring the ERO to submit an assessment of its performance three years from the date of its certification by the Commission and every five years thereafter).

[9] 18 C.F.R. § 39.10 (2007).

WECC's behalf, by NERC, in accordance with 18 C.F.R. § 39.10. Therefore, NERC and WECC ask for clarification that WECC may submit future bylaw amendments in the form of a petition under Rule 207 of the Commission's Rules of Practice and Procedure, and not as a tariff filing pursuant to section 205 of the FPA.[10] Further, NERC and WECC state that this clarification "would also be applicable to amendments to the bylaws of other Regional Entities that do not relate to their section 215 functions, and thus would provide guidance to all eight Regional Entities and to NERC."[11]

18. The Commission has previously found that Regional Entity bylaws are "rules" pursuant to section 39.10 of the Commission's regulations.[12] Section 39.10 requires that a Regional Entity submit rule changes for Commission approval. We agree with NERC and WECC that the WECC bylaws pertain primarily to WECC's function as a Regional Entity and it is appropriate that future bylaw filings be submitted to the Commission as a Regional Entity rule change pursuant to Rule 207 of the Commission's Rules and Procedures. This Commission review suffices, and the Commission will no longer require WECC to submit a WECC bylaw revision as a tariff revision.

19. While this approach is acceptable for most other Regional Entities, we note that the Commission has previously addressed the appropriate manner of review of bylaw revisions by a "hybrid" entity that oversees regional reliability as a Regional Entity and also performs transmission operation functions as a regional transmission organization. Specifically, while only those provisions of the SPP bylaws that relate to the SPP Regional Entity require NERC approval, any other proposed revision to the SPP bylaws that is filed with the Commission pursuant to FPA sections 205 or 206 (and must also be served on NERC). Such hybrid organizations must continue to follow this approach.[13]

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[10] *Id.* § 385.207 (requiring that a person file a petition when seeking, *inter alia*, a declaratory order, rule of general applicability or "any other action which is in the discretion of the Commission and for which this chapter prescribes no other form of pleading.").

[11] *See* WECC Bylaws Filing at 3.

[12] *See Delegation Agreements Order*, 120 FERC ¶ 61,260 at P 457.

[13] *Id.* P 17-19.

B. Effective Date and Deadline for Revisions

20. NERC, in the October 30 Filing, does not request a specific effective date applicable to its proposed revisions. In its answer, NERC requests that the CMEP and hearing procedures in particular be approved as filed. NERC explains that several Regional Entities are prepared to conduct compliance enforcement hearings based on the proposed hearing procedures and significant changes may cause confusion and delay. NERC asks that, if the Commission directs changes to the CMEP or hearing provisions, that the Commission identify areas of concern and not direct specific, textual revisions. NERC further requests that it be allowed a reasonable period of time (such as 150 days) to submit a filing that addresses the Commission's concerns. NERC states that this approach will allow NERC and the Regional Entities to employ an orderly, stakeholder process without disrupting current activities.[14]

21. We find that the revisions proposed in the October 30 Filing are generally responsive to the Commission's concerns set forth in the *April 19 Order*. Thus, we accept NERC's October 30 Filing and the proposed revisions to the *pro forma* Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC to submit a filing within 120 days of the date of this order addressing our concerns regarding the specific provisions discussed below. In the *April 19 Order*, the Commission directed a substantial amount of revisions to the *pro forma* and individual Delegation Agreements, including certain revisions to Regional Entity bylaws. The Commission recognized that a significant period of time was needed to reach consensus and effect these changes and directed that NERC submit revisions within 180 days.

22. The revisions directed in this order are of a lesser magnitude. As such, a 120 day compliance deadline is reasonable. In particular, any hearing pending before a Regional Entity hearing body should not be delayed or otherwise disrupted by the changes in the hearing procedures contemplated by this order.

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[14] NERC answer at 4.

C. Revisions to the *Pro Forma* Delegation Agreement

1. Net Energy for Load (Section 8(b) and Exhibit E, Section 2)

a. NERC's October 30 Filing

23. Section 8(b) of the *pro forma* Delegation Agreement provides that the costs of carrying out Regional Entity responsibilities will be equitably allocated among end users within the region and recovered through a formula based on net energy for load. Exhibit E (Funding), section 2 contains similar language. NERC proposes to revise section 8(b) and Exhibit E to allow the following exception ". . . or through such other formula as is expressly provided for in the annual business plan and budget submitted by NERC and [Regional Entity] to the Commission. . . ." NERC claims that the new provisions will provide flexibility to use alternative allocation formulas as specific circumstances warrant and are necessary to assist in resolving issues raised by some Canadian members in connection with the costs of compliance and enforcement activities in Canada. In addition, NERC points out that in the future other circumstances may arise where the flexibility to use alternative allocation formulas may be needed. Finally, NERC states that any alternative allocation formula must be filed with and approved by the Commission before it can be used.

b. Commission Determination

24. In Order No. 672, the Commission found that funding apportionment based on net energy for load is a fair and reasonable method for allocating costs.[15] In the *ERO Certification Order*, moreover, the Commission approved NERC's proposed allocation of costs based on net energy for load.[16] We continue to believe that net energy for load provides a fair and reasonable means for allocating costs and are concerned that NERC's proposed revision would be used to encourage local differences to a methodology that is currently applied across the regions. Nonetheless, with one refinement discussed below,

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[15] *Rules Concerning Certification of the Electric Reliability Organization; and Procedures for the Establishment, Approval and Enforcement of Electric Reliability Standards*, Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 213, *order on reh'g*, Order No. 672-A, FERC Stats. & Regs. ¶ 31,212 (2006).

[16] *ERO Certification Order,* 116 FERC ¶ 61,062 at P 167.

we accept NERC's proposed revision to accommodate possible international concerns on cost allocation, as stated by NERC.

25. As mentioned above, NERC's proposal would allow for changes to the allocation costs formula as "expressly provided for in the annual business plan and budget." Our regulations provide that the ERO is required to submit its proposed budget and business plan 130 days in advance of the beginning of the ERO's fiscal year, and that the Commission will issue an order addressing the proposal no later than 60 days in advance of the beginning of the ERO's fiscal year.[17] We are concerned that the inclusion of a proposal to change the cost allocation formula in the ERO budget will not allow the Commission sufficient time to consider the matter. Further, we are concerned that, if the Commission rejects the proposed change or directs a revision, this action may impact the ability of a Regional Entity to allocate, bill and collect costs on a timely basis. Thus, we direct the ERO to further revise section 8(b) of the *pro forma* Delegation Agreement and Exhibit E, section 2 so that a proposed change in cost allocation formula may be submitted in advance of the annual business plan and budget, not to be effective until the following business plan and budget are in effect.

2. Regional Advisory Body (Section 8(e))

a. NERC's October 30 Filing

26. NERC proposes to revise section 8(e), a provision which addresses the Regional Entity's obligation to submit its proposed budget to NERC for NERC's review. NERC proposes to delete language stating that Regional Entity budget submissions shall include "the budget, supporting materials, and proposed allocation and method of collection for the costs of any approved regional advisory body." NERC states that the language does not reflect actual practice and is unnecessary as currently the Western Interconnection Regional Advisory Body (WIRAB) is the only Regional Advisory Body and that WIRAB develops and submits its proposed budget directly to NERC independent of WECC.

b. Commission Determination

27. We accept NERC's proposed change, subject to clarification. While WIRAB will develop its own budget, WECC will remain responsible for allocating portions of WIRAB's approved funding to end users in the United States, Canada and Mexico, as

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[17] 18 C.F.R. §§ 39.4(b) and (c) (2007).

well as performing the billing and collection function for WIRAB's approved funding on behalf of NERC. Accordingly, when NERC reports WIRAB's total approved funding, NERC must include a breakdown of the total funds allocated by country as well an explanation of how WIRAB's funding affects the allocation and collection of costs to WECC end users in the United States. The Commission must have a clear record before it that presents and explains the entirety of funds that WECC will collect from end users under FPA section 215.

3. Uniform System of Accounts (Section 8(e))

a. NERC's October 30 Filing

28. Section 8(e) of the *pro forma* Delegation Agreement states that the Regional Entity will follow NERC's prescribed system of accounts. NERC proposes to add "except to the extent NERC permits a departure from the prescribed system of accounts." NERC explains that, currently, the Regional Entities are using the income statement accounts in the NERC system of accounts. However, because NERC and the Regional Entities have varying corporate structures, NERC has not required the Regional Entities to use the balance sheet accounts in the NERC system of accounts. NERC states that it may not be possible for the Regional Entities to use the full NERC system of accounts.

b. Commission Determination

29. A fundamental basis for the existence of a system of accounts is uniformity. Uniformity of the information reported allows for meaningful comparisons to be made between accounting periods and between entities. The uniformity provided by NERC's system of accounts and related accounting instructions permits comparability and analysis of data provided by NERC and the Regional Entities in their budget filings, among other things. This uniformity is essential for identifying costs of statutory and non-statutory activities, comparing each fiscal year budget with actual results, making comparisons among the Regional Entities and ensuring that funds approved for statutory activities are adequately controlled.

30. As a result, it is essential that waivers of NERC's system of accounts be at a minimum. In its October 18, 2007 Order, the Commission required that NERC's system of accounts include income statement accounts for non-statutory functions that each Regional Entity performs.[18] Therefore, the NERC system of accounts should provide for

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[18] *North American Electric Reliability Corp.*, 121 FERC ¶ 61,057, at P 78 (2007).

all statutory and non-statutory income, revenue, and expense activities each Regional Entity incurs, and deviations from the income statement accounts in the NERC system of accounts should not be necessary.

31. However, we recognize that there may be limited instances in which it would be appropriate for a Regional Entity to deviate from the balance sheet accounts reflected in the NERC system of accounts (e.g., where the Regional Entity is required to reflect its various corporate structures). As such, we will accept the change to section 8(e) as modified to allow NERC to permit the Regional Entities to deviate from the balance sheet accounts in the NERC system of accounts for good cause. However, we require NERC to file with the Commission, for informational purposes, any such waiver that NERC grants along with an explanation supporting the waiver. This requirement will ensure that all ERO financial and budget data filed with the Commission are uniform and comparable.

4. Funding of Non-Statutory Activities (Exhibit E, section 5)

a. NERC's October 30 Filing

32. NERC proposes to amend the *pro forma* Exhibit E, which addresses Regional Entity funding. NERC proposes to add a new section 5 addressing the budget and funding for non-statutory activities. Section 5 provides that if the Regional Entity performs any non-statutory activities, the Regional Entity must submit as part of its annual budget request to NERC: (i) a detailed list of, a detailed description of and its budget for, the non-statutory activities; and (ii) a statement of the Regional Entity's procedures to ensure that funding of non-statutory activities will be kept separate from the funding of the Regional Entity's delegated functions and activities. NERC states that the information required by section 5 will enable NERC to comply with the requirements of 18 C.F.R. § 39.4(b) and the directive in the Commission's order on the 2007 business plan and budget filing.[19]

b. Commission Determination

33. We accept NERC's proposed new section 5 because it will assist NERC in complying with the requirements of 18 C.F.R. §39.4(b) and the directive in the Commission's order on the 2007 business plan and budget filing. However, we note that

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[19] *North American Electric Reliability Corp.*, 117 FERC ¶ 61,091 at P 125 (2006).

the proposed revision does not change the *April 19 Order*'s requirement that each Regional Entity revise its Exhibit E to identify all non-statutory activities, if any, engaged in by the Regional Entity and clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities.[20]

D. Revisions to the Compliance Monitoring and Enforcement Program

1. Compliance Audits and Investigations (CMEP, Section 3.0)

34. The *April 19 Order* generally accepted CMEP, section 3.1, regarding the procedures each Regional Entity would be required to use in carrying out compliance audits. However, the Commission required NERC to specify, at section 3.1.3, that both NERC and the Commission will receive notice of an unscheduled audit.[21] The *April 19 Order* also directed NERC to include provisions giving an audited entity sufficient advance notice of an unscheduled compliance audit to enable the audited entity to assess and, if necessary, contest the composition of the audit team.[22] In addition, the *April 19 Order* found that an audited entity should have the right to challenge the composition of the audit team in every circumstance, even where the audit team member has been appointed less than 15 days in advance of the audit.[23] Finally, the *April 19 Order* directed NERC to explain and further support the CMEP section 3.0 authorization permitting a compliance enforcement authority to undertake a "facts and circumstances" review prior to any enforcement action or hearing.[24]

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[20] We address this issue, below, in the specific context presented by the NPCC Delegation Agreement, the SPP Delegation Agreement, and the FRCC Delegation Agreement.

[21] *April 19 Order*, 119 FERC ¶ 61,060 at P 45.

[22] *Id.* P 47.

[23] *Id.* P 50.

[24] *Id.* P 176 (noting that under section 3, the compliance enforcement authority is authorized, at its discretion, to request a "fact and circumstances" review of an alleged violation prior to any enforcement action or hearing).

a. NERC's October 30 Filing

35. NERC states that it has revised CMEP section 3, consistent with the requirements of the *April 19 Order*. With respect to the Commission's notice requirements applicable to an audited entity, in the case of an unscheduled audit, NERC has modified section 3.1.1 to state that: (i) NERC and the Commission will receive notice of the audit; (ii) the registered entity will receive at least ten business days advance notice of the audit; and (iii) the registered entity will be given five business days to object to the composition of the unscheduled compliance audit team. NERC further states that to make explicit the authority of NERC and of "Applicable Governmental Authorities" to initiate compliance violation investigations, section 3.4 has been revised to state that a compliance violation investigation may be initiated at any time by NERC, the Commission or another applicable governmental authority (as well as by the compliance enforcement authority).[25]

36. Finally, in response to the *April 19 Order*'s requirement that NERC address the CMEP section 3.0 authorization permitting a compliance enforcement authority to undertake a "facts and circumstances" review prior to any enforcement action or hearing, NERC proposes to replace the existing authorization with a new, expanded provision explaining, among other things, that "[p]rior to reporting an Alleged Violations [sic] of Reliability Standards to NERC under section 8.0, the Compliance Enforcement Authority may review the report of violation submitted to it by the Registered Entity, audit team, or others for accuracy and completeness."

b. Comments

37. New York ISO argues that both the notice allowances and objection deadlines, at section 3.1.3, should be consistent with the corresponding time frames included in other similar NERC compliance processes under section 3.0.[26] New York ISO requests the

[25] NERC proposes to change the definition in CMEP section 1.1.3 of Applicable Governmental Entity from "[a] governmental body other than [the Commission] with authority to enforce Reliability Standards against a Registered Entity" to "[the Commission] within the United States and the appropriate, governmental authority with subject matter jurisdiction over reliability in Canada and Mexico."

[26] New York ISO cites to CMEP sections 3.3 and 3.4. Section 3.3 (addressing the spot checking process) states that compliance auditors may be assigned by the compliance enforcement authority as necessary for this process but establishes no

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adoption of a ten business day deadline applicable to registered entity objections to members of the unscheduled audit team.

38. MRO asserts that NERC's compliance revisions place an undue emphasis on U.S.-based audit standards, such as Government Accountability Office (GAO) standards, at the expense of broader, more comprehensive standards. MRO argues that the narrow focus taken by NERC was not required by the *April 19 Order*, which only held that NERC's compliance audits standards would be required to be consistent with the GAO Standards. MRO requests clarification that NERC will be entitled to consider a broader set of auditing standards that includes U.S., Canadian and other international sources.

c. Commission Determination

39. We accept NERC's revised section 3.0 procedures and direct modifications. First, NERC's revisions to section 3.1.3 appropriately note that "[t]he Compliance Enforcement Authority shall notify NERC and [the Commission] that an unscheduled Compliance Audit is being initiated." However, this provision must be revised to specify *when* NERC and the Commission will receive this notice. We see no reason, in this regard, absent good cause shown, why NERC and the Commission cannot receive this notice on or before the date on which an audited entity is notified. We direct NERC to change its procedures accordingly.

40. We also require NERC to revise its section 3.0 review process. This provision, as proposed, appears to authorize the compliance enforcement authority to undertake an "accuracy and completeness review" about whether to submit to NERC a report of alleged violation concerning evidence of a possible violation that the compliance enforcement authority receives.[27] Accordingly, we direct NERC to clarify the

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procedures or time frames for a registered entity to object to the composition of the compliance auditors. Section 3.4 (addressing the compliance violation investigation process) states that a registered entity will be given ten days to object to the composition of the investigation team.

[27] CMEP section 1.1.1 defines an "Alleged Violation" as a potential violation for which the compliance enforcement authority has completed its "accuracy and completeness review" and has determined that evidence exists to indicate that a registered entity has violated a Reliability Standard. By contrast, the section 3.0 review appears to be directed to making a preliminary determination whether a report of a violation contains evidence that a registered entity *may* have violated a Reliability Standard.

circumstances in which the accuracy and completeness review process will be utilized. If, indeed, NERC intends this review to occur *before* the compliance enforcement authority submits its report of an alleged violation to NERC, we believe that review would conflict with our directive in the *April 19 Order* that "NERC cannot adequately exercise its oversight of Regional Entity compliance programs unless it receives information on all allegations of violations and in particular, those for which Regional Entities have declined enforcement action."[28]

41. We reject, in part, New York ISO's protest regarding the time allowances set forth in section 3.1.3. New York ISO asserts that the time allowance for objections to auditors or investigators should be consistent throughout section 3.0. However, under the CMEP, an entity likely will receive more advance notice of a scheduled audit than of an unscheduled audit or investigation. The shorter time periods for submission of objections to participants in unscheduled audits and investigations appear appropriate in light of this difference. However, we agree with New York ISO that an audited entity, in the case of a spot check, under section 3.3, should also be permitted to object to a compliance auditor (other than a NERC or Commission Staff member). Accordingly, NERC is directed to revise section 3.3 to provide this opportunity.

42. With respect to MRO's arguments regarding the use of protocols other than the GAO standards, we clarify that NERC may rely on Canadian and other international accounting standards when designing its audit procedures. However, audits conducted in the United States will be required to be consistent with the GAO standards.[29] MRO's assertion that reliance on these standards will require it to incur additional costs and diminish international cooperation is unsupported. Nor does MRO identify any relevant Canadian or other international auditing standard that is fundamentally inconsistent with any GAO standard.

43. Finally, we approve NERC's revision, quoted above, to CMEP section 3.4, subject to our clarifications, below, regarding cross border cooperation and consultation. Given the interconnected nature of the North American Bulk-Power System, it is important that

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[28] *April 19 Order*, 119 FERC ¶ 61,060 at P 201.

[29] Specifically, NERC and the Regional Entities should base their compliance audit processes in the U.S. on professional auditing standards recognized in the U.S., such as Generally Accepted Accounting Standards, Generally Accepted Government Auditing Standards, and standards sanctioned by the Institute of Internal Auditors.

NERC, its Regional Entities and the Commission work closely with Canadian and Mexican regulatory officials (and they with us) when investigating matters that occur within one jurisdiction but affect other regulatory authorities. To implement this commitment, it is necessary to ensure that intergovernmental procedures be developed that protect the general, non-public nature of violations and alleged violations, as required by our regulations.[30]

44. The Commission is committed to working together with Canadian and Mexican authorities to develop procedures under which the Commission receives notice that an applicable governmental authority wishes to obtain information from or about a U.S. registered entity for purposes of conducting an investigation. The Commission must be assured that non-public U.S. compliance-related information, such as the existence, nature, and status of investigations, and non-public information and documents obtained during them, will be protected from public disclosure.

45. Accordingly, our approval of NERC's proposed revisions to CMEP section 3.4 to recognize that an applicable governmental authority may commence an investigation into a U.S. related matter is conditioned on NERC's obligation to provide notice to the Commission of such an investigation, prior to disclosure of any information relating to the matter to the applicable governmental authority. NERC's notice, moreover, must disclose the nature of the proposed disclosure and the procedures to be utilized to ensure compliance with the requirements of section 39.7(b)(4).

46. We would expect to enter into reciprocal agreements with governmental authorities in Mexico and Canada before seeking comparable information from any applicable governmental authority in these countries. Both types of agreements should recognize the international nature of NERC and affected Regional Entities and their roles in enforcing mandatory Reliability Standards within the United States.

47. However, without precluding NERC's submission of an alternative proposal, we reject other proposed changes in section 3.4 and other provisions of the CMEP in which NERC would permit itself, prior to obtaining our permission, to disclose non-public U.S. compliance information covered by section 39.7(b)(4) to Canadian or Mexican governmental authorities that are included in the definition of "Applicable Governmental Authority." These proposed changes would revise provisions that currently permit the submission of non-public compliance information to "the Commission *or* Applicable

[30] *See* 18 C.F.R. § 39.7(b)(4) (2007).

Governmental Authorities" to permit submission of this information to "the Commission *and* any other Applicable Governmental Authority."[31]

48. As discussed above, we agree that Canadian and Mexican regulatory authorities with jurisdiction over reliability would have a legitimate interest in obtaining such information, and we would authorize such transmittals of information under appropriate conditions. We nevertheless believe NERC's proposal is overbroad and requires further explanation and clarification for us to consider it. First, it is unclear whether NERC would provide notice of all Regional Entity reports of alleged violations, compliance audit reports, notices of alleged violations and quarterly updates to Canadian and Mexican authorities, regardless whether these reports might address matters pertaining to particular Canadian and Mexican portions of the Bulk-Power System.

49. In addition, we cannot ascertain whether NERC proposes to provide these reports and information to each Canadian or Mexican regulatory authority with jurisdiction over reliability or solely to those authorities that might have an interest in a particular report. Nor does NERC indicate whether it intends to provide to us reciprocal reports, that is, compliance information relating to Canadian or Mexican entities that might affect the U.S. portion of the Bulk-Power System. Finally, NERC does not describe how it would protect the non-public character of information it would provide to Canadian and Mexican authorities. Accordingly, we reject NERC's proposal.

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[31] For example, NERC proposes to amend the second paragraph of CMEP section 8.0 to provide that it will notify the Commission and any other Applicable Governmental Authority of "any allegations or evidence of violations of Reliability Standards regardless of significance, whether verified or still under investigation, that are received or obtained by [a] Regional Entity through any means…." The existing provision, by contrast, states that NERC will provide these notifications to the Commission or any other Applicable Governmental Authority. Other proposed changes are located at: CMEP section 3.1.6 (providing final compliance audit reports); section 3.4.1, Step 12 (notification that an investigation has concluded that no violation occurred); section 5.1 (notification of issuance of a notice of alleged violation); section 5.6 (filing of a notice of penalty, which may contain non-public information); and section 8.0, paragraph 6 (quarterly reports on the status of alleged and confirmed violations). In each of these circumstances, absent appropriate procedures to protect the non-public nature of U.S. compliance-related information, public disclosure of this information could occur, in violation of section 39.7(b)(4).

2. <u>**Confidentiality (CMEP, Section 3.4)**</u>

50. The *April 19 Order* found that, while NERC's general statement of policy regarding the confidentiality of its investigations, at CMEP section 3.4, is appropriate, clarification is necessary regarding the authority of the Commission to determine that a particular NERC or Regional Entity investigation (or information obtained in it) should be publicly disclosed.[32] NERC states that it has revised section 3.4 (and a corollary provision at section 403.14 of the NERC Rules of Procedures) to comply with the Commission's directive.

51. We accept NERC's proposed revisions. If an applicable governmental authority in Canada or Mexico is considering whether to conduct a public investigation into matters that occur with respect to the U.S. portion of the North American Bulk-Power System, we plan to request that the applicable governmental authority notify the Commission before making such a determination so that appropriate consultations may occur about the nature of the investigation and the need for any public disclosure. Similarly, when considering whether to conduct a public investigation of a matter concerning the Canadian or Mexican portions of the North American Bulk-Power System, we will consult with each applicable governmental authority.

3. <u>**Settlements (CMEP, Section 5.4)**</u>

52. The *April 19 Order*, in addressing NERC's proposed procedures for processing settlements, found that the time period specified in CMEP section 5.4 during which settlement may be pursued must be revised to include the period prior to the issuance of a notice of an alleged violation.[33] NERC, in response, has revised section 5.4 to state that "[s]ettlement negotiations may occur at any time, including prior to the issuance of a notice of Alleged Violation and sanction until a notice of penalty is filed with [the Commission] or another Applicable Governmental Authority."

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[32] *April 19 Order*, 119 FERC ¶ 61,060 at P 126.

[33] *Id.* P 104 (directing NERC to modify section 5.4 to state that settlement negotiations may occur at any time until a notice of penalty is filed with the Commission or an applicable governmental authority).

a. <u>Comments</u>

53. TAPS argues that while NERC's revision may satisfy the Commission's compliance directive, NERC's proposed language change creates ambiguity as to whether the initiation of the settlement process can result in postponement of the issuance of a notice of alleged violation and sanction pursuant to CMEP section 5.1 or avoidance of such issuance entirely. TAPS proposes that section 5.4 be revised to make clear that: (i) initiation (and even conclusion) of settlement discussions prior to issuance of a notice of alleged violation will not delay or avoid issuance of the notice; and (ii) all settlements must be disclosed, including any settlement reached prior to issuance of a notice of alleged violation.

b. <u>Commission Determination</u>

54. We accept NERC's proposed revision. Because settlements are essential to an effective enforcement program for Reliability Standards, we encourage meaningful settlement discussions at any stage in the compliance enforcement process. TAPS presents no evidence that a Regional Entity's settlement discussions with an entity will unduly delay issuance of a notice of alleged violation. To the contrary, settlement discussions, if successful, will decrease the need to issue such a notice or take additional action. We also note that section 5.4 requires NERC to post any Regional Entity settlement that it approves, "regardless of whether the settlement includes or does not include an admission of a violation." This provision does not require that a Regional Entity issue a notice of alleged violation prior to entering into a settlement.

4. <u>Appeals (CMEP, Section 5.5) and Notice of Penalty (CMEP, Section 5.6)</u>

55. The *April 19 Order* found that NERC should be authorized to change penalty determinations on its own motion if a registered entity decides not to appeal.[34]

a. <u>NERC's October 30 Filing</u>

56. NERC, in response, has revised CMEP, sections 5.5 and 5.6 to state that NERC may direct a Regional Entity to revise a decision or a penalty determination that "clearly conflicts with the goal of consistent national reliability enforcement." NERC has also

[34] *Id.* P 173.

revised section 5.5 to authorize NERC to revise a Regional Entity decision "where the requirement to revise the decision is necessary for NERC's oversight of Regional Entity compliance activities." NERC also proposes to add language to section 5.5 and 5.6 to authorize participants to reopen the proceedings on any issue should NERC direct a Regional Entity to revise a decision (section 5.5) or a penalty determination (section 5.6).

57. With respect to the right to reopen a proceeding, section 5.5 relies on language that differs from section 5.6. Specifically, while section 5.5 provides that, under the specified conditions, "any participant may reopen the proceedings on any issue," section 5.6 adds that "any participant may reopen the proceedings on any issue, *irrespective of whether the issue was previously litigated, settled or unopposed.*" (Emphasis added).

b. **Comments**

58. TAPS argues that under both provisions, a participant is permitted to "reopen the proceedings on any issue," if NERC has directed the Regional Entity to revise: (i) certain decisions (section 5.5); or (ii) certain penalty determinations (section 5.6). TAPS argues, however, that the parenthetical language added to this right to reopen in section 5.6 ("irrespective of whether the issue was previously litigated, settled or unopposed") should also be included in section 5.5. EEI/NRECA, in contrast, argue that the right to reopen a proceeding under these provisions is overbroad and otherwise unjustified. EEI/NRECA suggest limiting the right to reopen a proceeding to issues related to the action taken by NERC.

c. **NERC's Answer**

59. NERC, in its answer, agrees with TAPS that sections 5.5 and 5.6 should be consistent. Accordingly, NERC proposes to add, to section 5.5, the section 5.6 phrase "irrespective of whether the issue was previously litigated, settled or opposed."

d. **Commission Determination**

60. NERC's discretion to revise a Regional Entity decision pursuant to either sections 5.5 or 5.6 should not be limited to the reasons offered, i.e., where the decision: (i) "clearly conflicts with the goal of consistent national reliability enforcement;" (*see* proposed sections 5.5 and 5.6) or (ii) "where the requirement to revise the decision is necessary for NERC's oversight of Regional Entity compliance activities" (*see* proposed section 5.5). To the contrary, the Commission, in the *April 19 Order*, found that NERC's

discretion in this area must comport with the Commission's own authority to review NERC's determinations.[35] Accordingly, we direct NERC to amend sections 5.5 and 5.6 consistent with this broader authority.

61. We also note that there may be circumstances in which a penalty proceeding or determination should be reopened by NERC. It may be appropriate, for example, to reopen the Regional Entity's record if NERC were specifically to determine that the record did not support the penalty under appeal or review. However, it is unclear why the reopening of the proceeding by a participant would be appropriate in all instances in which NERC directs a Regional Entity to revise a decision. Nor has NERC explained why a participant in a penalty proceeding or determination (other than the registered entity to which the penalty would be assessed, or the compliance staff) should have the right to reopen a proceeding. However, EEI/NRECA's suggested limitations regarding the right to reopen a proceeding have merit. Accordingly, we direct NERC to work with its Regional Entities and other interested parties to consider this matter further and to propose, in its compliance filing, language changes consistent with our findings herein. In this regard, we note that NERC may, if it chooses, clarify the scope of a reopened proceeding, or may determine that the right to reopen is not appropriate.

5. Mitigation of Violations (CMEP, Section 6.0)

62. The *April 19 Order* found that CMEP, section 6.3 failed to address whether the rejection of a registered entity's proposed mitigation plan by the compliance enforcement authority, or hearing body, reinstates the liability for which the registered entity would have been responsible had it not submitted a plan. The Commission found that rejection of an entity's proposed mitigation plan should not immunize the entity from any such penalties or sanctions.[36]

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[35] *Id.* (holding that NERC must be authorized to change a penalty determination on its own motion).

[36] *April 19 Order*, 119 FERC ¶ 61,060 at P 88.

a. <u>NERC's October 30 Filing</u>

63. NERC states that it has revised section 6.3, consistent with the requirements of the *April 19 Order*.[37] In addition, NERC states that it has revised section 6.5 to specify that when notifying NERC of an accepted mitigation plan, the Regional Entity will provide the accepted mitigation plan to NERC. NERC states that it has also revised section 6.5 to specify that: (i) NERC will review the mitigation plan and will notify the Regional Entity, which in turn will notify the registered entity, as to whether the mitigation plan is approved or disapproved by NERC; and (ii) if NERC disapproves the mitigation plan, it shall state its reasons for disapproval and may state changes to the mitigation plan that would result in approval by NERC. Finally, NERC states that section 6.5 has been revised to state that NERC will be required to submit to the Commission, as non-public information, within seven business days, approved mitigation plans addressing violations of Reliability Standards.[38]

b. <u>Comments</u>

64. New York ISO argues that NERC's proposed revision to CMEP section 6.3 misinterprets the *April 19 Order* regarding the imposition of penalties or sanctions in the case of a rejected mitigation plan. New York ISO interprets the Commission's above-noted directive to mean that in the case of a rejected mitigation plan, the registered entity will be in the same position as it would have been had it not submitted a mitigation plan, but will not be placed in a worse position (i.e., liable for penalties or sanctions without the right to a hearing). New York ISO proposes that section 6.3 be revised to provide

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[37] Section 6.3, as revised, provides in relevant part as follows:

> If a Mitigation Plan submitted by a Registered Entity is rejected by the Compliance Enforcement Authority or the hearing body in accordance with Section 6.5, the Registered Entity shall be subject to any findings of violation of the applicable Reliability Standards during the period the Mitigation Plan was under consideration and to imposition of any penalties or sanctions imposed for such violations.

[38] NERC asserts that this revision complies with the Commission's ruling in *North American Electric Reliability Corporation*, 119 FERC ¶ 61,274, at P 7 and 9 (2007) (*Mitigation Plan Order*).

that a registered entity “may,” not “shall,” be subject to any findings of violation and to imposition of any penalties or sanctions under these circumstances.

65. Similarly, EEI/NRECA comment that NERC’s proposed revisions to section 6.3 exceed the clarification requested by the Commission. They suggest that section 6.3 be revised to clarify that the compliance enforcement authority has discretion to determine that rejection of a mitigation plan does not necessarily subject the entity to penalties or sanctions for violations that otherwise would not have applied absent the rejection, especially when disapproving a plan to get clarification of its terms or to require *de minimis* revisions, or when a registered entity can quickly cure objections. EEI/NRECA argue that this discretion is particularly important when NERC and Regional Entities are establishing compliance processes and when registered entities have little experience in preparing mitigation plans relating to mandatory Reliability Standards.

66. TANC argues that NERC’s proposed revisions to section 6.5 fail to place any time limitation applicable to NERC’s review of a mitigation plan. TANC recommends that a reasonable timeframe is 30 days. TAPS suggests that section 6.5 be modified to clarify that when a mitigation plan is initially approved by a Regional Entity but subsequently rejected by NERC, the entity should not be subject to penalties for the period after acceptance by the Regional Entity and before rejection by NERC. TAPS argues that it would be unfair to penalize the entity, acting in good faith, for the failure of the Regional Entity to anticipate NERC's actions. In addition, TANC asserts that CMEP, figure 6.1 (summarizing the mitigation plan process) is inconsistent with section 6.5, as revised.

c. NERC’s Answer

67. NERC agrees with intervenors that if the Regional Entity has accepted a mitigation plan, but the plan is then rejected by NERC, the registered entity should not be subject to penalties or sanctions during the time the approved plan was under consideration by NERC (and for a reasonable time thereafter), so long as a revised mitigation plan complying with NERC’s directives is submitted within this timeframe.

68. NERC also agrees with TANC’s suggestion that section 6.5 be revised to state that NERC will be given 30 days to complete its review of a mitigation plan. In addition, NERC commits to revising its figure 6.1 summary, consistent with the substantive text of section 6.5.

d. Commission Determination

69. We find that NERC’s revision to section 6.3 complies with the *April 19 Order*. We reject, as unnecessary, New York ISO’s and EEI/NRECA’s proposed additional revision giving Regional Entities and NERC discretion, in the case of a rejected

mitigation plan, to impose (or waive) penalties or sanctions that might have applied while the proposed mitigation plan was being reviewed. NERC's proposed addition to section 6.3 already allows for this discretion.

70. We also accept NERC's proposed revision to section 6.5, as amended in its answer, regarding the time allowance NERC will be given to review a mitigation plan, and NERC's commitment to conform figure 6.1 to the text of section 6.5. However, it is unclear whether section 400 of the NERC Rules of Procedure is consistent with NERC's revisions of section 6.5 with respect to review of mitigation plans approved by Regional Entities to comply with the Commission's directives in the *Mitigation Plan Order*.[39] Accordingly, we direct NERC to amend, or further support, this provision.

6. Remedial Action Directives (CMEP, Section 7.0)

71. The *April 19 Order* required that CMEP, section 7.0 be revised to require a compliance enforcement authority to provide actual notice to a registered entity of a remedial action directive prior to the expiration of the two-business day deadline for contesting the directive.[40] In response, NERC revised section 7.0 to provide that "[a]ny Remedial Action Directive must be provided in a notice to the Registered Entity …."

a. Comments

72. New York ISO argues that NERC's revision fails to specify that *actual*, not constructive, notice is required. New York ISO concludes that, as such, NERC's proposed revision fails to comply with the *April 19 Order*.

[39] The only provision of NERC's Rules of Procedure that refers to NERC's review of a proposed mitigation plan is section 404.2, which refers to the submission of a mitigation plan to NERC by an owner, operator or user of the Bulk-Power System or a regional reliability organization when NERC finds such an entity to be noncompliant with a Reliability Standard. This provision does not cover NERC's review of mitigation plans approved by Regional Entities. In addition, this provision's reference to regional reliability organizations is outdated. Accordingly, we direct NERC to revise its Rules of Procedures with respect to NERC's review of mitigation plans to be consistent with the directives of the *Mitigation Plan Order*, 119 FERC ¶ 61,274 at P 6-7.

[40] *April 19 Order*, 119 FERC ¶ 61,060 at P 93.

b. Commission Determination

73. We agree that NERC's proposed revision to section 7.0 fails to comply with the *April 19 Order*'s requirement that actual notice of a remedial action directive be given to the registered entity. Actual notice, if it is to be ensured, requires specificity as to how it will be provided. Accordingly, we direct NERC to revise section 7.0 to include a means for ensuring that a registered entity receives actual notice of a remedial action directive and for ascertaining the date on which actual notice occurs.[41]

E. The NERC Hearing Procedures (CMEP, Attachment 2)

74. The *April 19 Order* found that NERC's proposed hearing procedures failed to expressly address, or describe, a number of its component parts.[42] NERC, in response, states that the NERC hearing procedures have been comprehensively revised to include this necessary level of detail. NERC points out that while its originally filed hearing procedures contained approximately six pages of text, the NERC hearing procedures, as revised, are over 33 pages long. NERC adds that the NERC hearing procedures also utilize a different numbering system and organizational format.

75. For the reasons discussed below, we accept the NERC hearing procedures. We also identify substantive revisions to be submitted by NERC in its compliance filing, along with several editorial revisions.[43] In addition, we require NERC to adopt, in the NERC hearing procedures and at section 1501.3 of the NERC Rules of Procedure, the

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[41] As discussed later in this order, NERC and the Regional Entities concur that paragraph 1.9.1 of the NERC hearing procedures must be revised to state that a registered entity must file notice that it contests a remedial action directive within two business days of its receipt of the directive, rather than within two days of issuance of the directive. To ensure consistency between section 7.0 and paragraph 1.9.1, we direct NERC that, when making this revision, it further amend paragraph 1.9.1 to refer to a registered entity's actual receipt of a remedial action directive.

[42] *Id.* P 146.

[43] Specifically, in the third sentence of paragraph 1.4.6, we direct NERC to delete the word "in" following the phrase "in regard to." In paragraph 1.4.10, we direct NERC to substitute the word "all" in place of the word "both" in the phrase "may exercise its discretion to examine the actions of both Registered Entities."

RFC Delegation Agreement's proposed revision to the term "Critical Energy Infrastructure Information" (a revision which reflects the Commission's most recent amendment of this term in Order No. 683).[44]

1. Definitions and General Applicability (Paragraph 1.1)

76. *Paragraph 1.1.2 (Waivers, Suspension and Modifications of the NERC Hearing Procedures)*. Paragraph 1.1.2 states, "To the extent permitted by law, any provision in these Hearing Procedures may be waived, suspended or modified by the Hearing Officer … or the [hearing body], for good cause shown, either upon the Hearing Officer's or the [hearing body's] own motion or upon the motion of any Participant." Georgia Coop argues that paragraph 1.1.2 should be revised to state that the NERC hearing procedures may not be waived, suspended or modified absent the consent of the respondent and, in the case of a hearing, all participants. We accept paragraph 1.1.2, as drafted, and reject Georgia Coop's proposed revision. Tribunals such as the NERC and Regional Entity hearing bodies typically have discretion to waive or suspend applicable rules for good cause shown, consistent with due process. Georgia Coop offers no support regarding why this same degree of discretion should not extend to these hearing bodies.

77. *Paragraph 1.1.5 (Critical Infrastructure*): Paragraph 1.1.5 defines the term "Critical Infrastructure" consistent with its definition under the NERC Rules of Procedure.[45] Georgia Coop argues that the term "virtual," as used in this definition, requires clarification. We reject Georgia Coop's request. The Commission accepted this definition as embodied in section 1501 of the NERC Rules of Procedure. We are not persuaded that the term "virtual" requires, or warrants, additional clarification here.

78. *Paragraph 1.1.5 (Participants)*. Paragraph 1.1.5 defines "Participant" as "any Person who is allowed or required to participate in a proceeding conducted pursuant to these Hearing Procedures[,] [including] the members of the Compliance Staff of the Compliance Enforcement Authority that participate in a proceeding." EEI/NRECA argue

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[44] *See Critical Energy Infrastructure Information*, FERC Stats. & Regs. ¶ 31,228 (2006); *See also* 18 C.F.R. § 388.112(c)(1).

[45] Specifically, "Critical Infrastructure" is defined to mean "existing and proposed systems and assets, whether physical or virtual, the incapacity or destruction of which would negatively affect security, economic security, public health or safety, or any combination of those matters."

that this definition should be revised to include third parties with relevant information regarding an alleged violation and should also be revised to include procedures pursuant to which a registered entity alleged to have violated a Reliability Standard can request the participation of third parties.[46] We accept this definition, as proposed. The term "Participant" is defined broadly enough under paragraph 1.1.5 to encompass any person "who is allowed or required" to participate in a NERC hearing. We also disagree that this definition is required to address how such participants will be allowed or required to participate. As we held in the *April 19* Order, the Commission will make this determination on a case-by-case basis.[47]

79. *Paragraph 1.1.5 (Respondent*): Paragraph 1.1.5 defines the term "Respondent" to mean "the Registered Entity who is the subject of the Notice of Alleged Violation or contested Mitigation Plan that is the basis for the proceeding, whichever is applicable." We require NERC to revise this definition. The definition, as drafted, fails to include a registered entity that is the subject of a contested remedial action directive.

80. *Paragraph 1.1.5 (Miscellaneous*). New York ISO and EEI/NRECA propose that the NERC hearing procedures be revised to cross-reference (rather than simply re-state) definitions specified in other NERC documents or the Commission's regulations.[48] In addition, Georgia Coop argues that the term "documents" should be defined. We reject, in part, New York ISO's and EEI/NRECA's request. If NERC wishes, it may rely on cross-references. If it chooses not to do so, however, we agree that NERC's defined terms must be revised when, and if, the corollary terms to which they are intended to refer themselves change.[49] Finally, we agree with Georgia Coop that the NERC hearing

[46] This issue is also addressed in the context of paragraph 1.5.8, below.

[47] *April 19 Order*, 119 FERC ¶ 61,060 at P 150.

[48] New York ISO points out, for example, that section 1.1.5 provides a definition for the term "Critical Energy Infrastructure Information," which is defined in the Commission's regulations. *See* 18 C.F.R. § 388.113 (2007).

[49] For example, this provision defines "Bulk-Power System" as the NERC Glossary's definition of "Bulk Electric System," which is consistent with the Commission's determination, for at least an initial period, to rely on the NERC definition with respect to the applicability to and the responsibility of specific entities to comply with mandatory Reliability Standards. *See Mandatory Reliability Standards for the Bulk-*

(continued…)

procedures should define the term "document." This added clarity will be useful as it relates to the rights of a participant to inspect and copy documents and will also address the scope of other discovery tools.

2. Submission of Documents (Paragraph 1.2.3)

81. *E*EI/NRECA and New York ISO argue that NERC's electronic filing requirements, when developed, should be consistent for all Regional Entities. We agree that consistency in electronic filing requirements is a worthwhile goal. However, we will not mandate this.

3. Interventions (Paragraph 1.2.12)

82. The *April 19 Order* rejected intervenors' arguments regarding the need for procedures to ensure the right of third parties to participate in NERC hearings.[50] However, the Commission recognized the need for certain exceptions to this rule (e.g., where more than one registered entity receives a notice of alleged violation for the same event or transaction). NERC, in response, states that paragraph 1.2.12 limits participation in a hearing to the respondents and compliance staff, "[u]nless otherwise authorized by the [Commission]."

83. EEI/NRECA argue that section 1.2.12 should be revised to specify the procedures pursuant to which third party intervention can be obtained from the Commission. NERC, in its answer, submits that any such procedures would necessarily address the rights and obligations of the Commission itself and would thus need to be promulgated by the Commission, not NERC.

84. We accept section 1.2.12, as drafted, and reject EEI/NRECA's request regarding the asserted need for additional specificity. Interventions and other participation by third parties will be addressed by the Commission, as necessary, on a case-by-case basis pursuant to our existing filing procedures, which we find to be adequate for the purpose.

Power System, Order No. 693, FERC Stats. & Regs. ¶ 31,242 at P 75 (2007), Order No. 693-A, *reh'g dismissed*, 120 FERC ¶ 61,053 at P 17-19 (2007).

[50] *April 19 Order*, 119 FERC ¶ 61,060 at P 150 (finding that, generally, third parties should not be permitted to intervene because, in most cases their contributions to the proceedings would be minimal and otherwise outweighed by the need to maintain confidentiality).

4. Proceedings Closed to the Public (Paragraph 1.2.13)

85. Paragraph 1.2.13 states that "[n]o hearing, oral argument or meeting of the [hearing body] shall be open to the public, and no notice, ruling, order or any other issuance of the hearing Officer or [hearing body], or any transcript, made in any proceeding shall be publicly released unless [NERC] or [the Commission] determine that public release is appropriate."

86. We accept this provision subject to clarification. Generally, only the Commission will be authorized to determine whether information relating to an enforcement proceeding pursuant to the CMEP will be made public.[51] Within the U.S., NERC may do so itself under only limited circumstances previously authorized by the Commission (e.g., when a notice of penalty is filed with the Commission).[52] We construe NERC's authorization under paragraph 1.2.13 regarding the public release of information relating to a non-public proceeding to refer only to these limited circumstances. With this same clarification, we also approve the comparable language set forth at paragraph 1.5.10(a).[53]

5. Hearing Requests (Paragraph 1.3.1)

87. Paragraph 1.3.1(b) provides that a registered entity that has received a notice of alleged violation may request a hearing if the compliance staff has submitted a response challenging the registered entity's proposed mitigation plan associated with the alleged violation. However, paragraph 1.3.1(b) fails to account sufficiently for the provisions of CMEP section 6.5, which specifies two instances in which a compliance staff challenge may be made. First, compliance staff may reject a mitigation plan within 30 days of initial receipt of the plan (unless the Regional Entity extends the time period).

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[51] For example, in the *April 19 Order*, we authorized the TRE hearing body, i.e., the Public Utility Commission of Texas, to conduct public hearings and issue public, written recommendations. *See Id.* at P 253.

[52] *See* 18 C.F.R. § 39.7(b)(4) (2007).

[53] Paragraph 1.5.10(a) states that "[a]ll proceedings, conducted pursuant to these Hearing Procedures, and any written testimony, exhibits, other evidence, transcripts, comments, briefs, rulings and other issuances, shall be non-pubic and shall be held in confidence by all Participants, except as [NERC] or [the Commission] authorizes or directs public disclosure of any portion of the record."

Alternatively, such a challenge can be made within 10 business days after the Regional Entity receives a revised mitigation plan following the rejection of an initial proposed plan. We clarify that paragraph 1.3.1 permits a registered entity to seek a hearing only in the latter instance, that is, after the compliance staff rejects a revised mitigation plan submitted by the registered entity. This clarification is consistent with the language of CMEP section 6.5.[54]

88. Paragraph 1.3.1 also provides that the full hearing procedure will apply, if requested by the registered entity, but that if the shortened hearing procedure is requested, compliance staff has the option to insist on the full hearing procedure. EEI/NRECA and New York ISO argue that this provision would inappropriately permit compliance staff to veto a registered entity's request for shortened hearing procedures. EEI/NRECA argue that this allowance also inappropriately blurs the separation of functions required as between the hearing body, which should decide this matter, and compliance staff, which stands in the shoes of the prosecutor.

89. We accept paragraph 1.3.1 and direct a change. As proposed, the full hearing procedure applies if compliance staff fails to file a timely response to the registered entity's election of the shortened procedure. However, this provision is not consistent with our determination that a party, if it seeks the full hearing procedure, must ask for it.[55] Accordingly, we direct NERC to amend paragraph 1.3.1, consistent with this requirement. Finally, we deny, as a collateral attack on the *April 19 Order*, EEI/NRECA's and New York ISO's arguments.[56]

6. <u>Shortened Hearing Procedures (Paragraph 1.3.2)</u>

90. The *April 19 Order*, in addressing NERC's proposed short-form procedures, required NERC to submit revisions requiring: (i) a prohibition against *ex parte* communications; (ii) sworn testimony; and (iii) transcription of testimony and related

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[54] Section 6.5 states, in the relevant part, that "[i]f the second review results in rejection of the Mitigation Plan, the Registered Entity may request a hearing pursuant to the Hearing Process."

[55] *April 19 Order*, 119 FERC ¶ 61,060 at P 161.

[56] *Id.*

proceedings.[57] NERC states that its proposed short form procedures, as revised at paragraph 1.3.2, comply with the requirements of the *April 19 Order*. Paragraph 1.3.2 provides, among other things, that "the rules applicable to the full hearing procedure shall apply to the shortened hearing procedure unless the context of such a rule is inconsistent with the procedure set forth in this Paragraph or otherwise renders it inapplicable to the shortened hearing procedure." Paragraph 1.3.2 also addresses the time period afforded to compliance staff for producing documents.[58]

91. EEI/NRECA request that section 1.3.2 be revised to shorten the period of time given to compliance staff to provide documents for copying from seven days to five, consistent with the provisions applicable to the full hearing procedure. EEI/NRECA also object to the uncertainty created by the section 1.3.2 provision referencing the applicability of the full hearing procedures *unless* "the context of such rule is inconsistent with the procedure set forth in [section 1.3.2] or otherwise renders it inapplicable to the shortened hearing procedure." EEI/NRECA propose that all such exceptions be expressly identified. At a minimum, EEI/NRECA request clarification regarding who will determine: (i) whether a given procedure is "inconsistent;" and (ii) whether that ruling may be appealed.

92. We accept paragraph 1.3.2. However, we agree with EEI/NRECA that compliance staff should not be given seven days under the shortened procedure to produce documents for copying, given the shorter period allowed for this task under full hearing procedures.[59] We, therefore, direct NERC to match this time limit for the shortened procedure to those of the full procedure. We reject EEI/NRECA's argument regarding the asserted need for specificity as to which of NERC's full hearing procedures are inconsistent with the shortened procedures. Paragraph 1.3.2 is clear that certain of these procedures, on their face, do not apply to the shortened procedures.[60] Ultimately,

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[57] *Id.* P 159.

[58] Paragraph 1.3.2 states in relevant part that "[w]ithin seven (7) days after the date on which the notice of hearing is issued, Staff shall make documents available to the Registered Entity for inspection and copying[.]"

[59] *See* NERC hearing procedures at paragraph 1.5.7.

[60] We note, for example, that the shortened hearing procedures bar the submission of testimony, an evidentiary hearing and, in certain instances, the submission of briefs. Paragraph 1.3.2 also provides only 14 days between the date on which compliance staff

(continued…)

however, the hearing body, or the hearing officer, possesses the discretion necessary to determine which procedures will apply in a given case.

7. **Notice of Hearing (Paragraph 1.4.1)**

93. Paragraph 1.4.1 requires a Regional Entity's clerk who receives filings relating to the hearing process to issue a notice of hearing within seven days of receipt of a request for hearing by a registered entity. Paragraph 1.4.1 also requires the clerk to include in the notice a statement that the registered entity has the option to elect either the shortened hearing procedure or the full hearing procedures. However, the hearing option to which this provision refers will have already been made by the registered entity in submitting its hearing request (as required by paragraph 1.3.1). Accordingly, we direct NERC to correct this provision.

8. **Hearing Officers (Paragraph 1.4.2)**

94. The *April 19 Order* required that the NERC hearing procedures provide additional details regarding the composition and duties of the compliance enforcement authority hearing body.[61] NERC, in response, states that paragraph 1.4.2 of the NERC hearing procedures complies with the *April 19 Order* by setting forth the authorities and responsibilities of hearing officers and hearing bodies, as well as the composition, quorem and voting rules for hearing bodies.

95. New York ISO argues that paragraph 1.4.2 must be revised to include provisions specifying that the hearing officer and hearing body will remain separate from compliance staff, i.e., that the hearing body and the prosecutor will not be the same entity. EEI/NRECA argue that paragraph 1.4.2 should be revised to require a hearing officer, if requested by a respondent. EEI/NRECA assert that, otherwise, it is unclear how a hearing would be conducted and what role the compliance staff would play in a hearing with no hearing officer appointed.

96. We accept paragraph 1.4.2. We reject, as unsupported, EEI/NRECA's contention that a respondent should be able to require a Regional Entity's hearing body to designate a hearing officer to preside over a hearing. EEI/NRECA offer no support for its

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produces documents and the date it submits its initial comments. We infer from this timing sequence that, in most cases, only minimal discovery, if any, will be available.

[61] *April 19 Order*, 119 FERC ¶ 61,060 at P 151.

argument that compliance staff's role will be unclear if a hearing body, rather than a hearing officer, presides over a hearing. In fact, compliance staff's role should be the same no matter who presides. Moreover, the hearing body should retain discretion to determine whether to assign a hearing officer for a particular proceeding. We also observe that nothing in the NERC hearing procedures prevents a registered entity from asking for assignment of a hearing officer in its request for hearing.

97. We also reject New York ISO's separation-of-functions argument. The general rules regarding the independence and impartiality of hearing bodies and hearing officers fully address New York ISO's concerns.

9. Interlocutory Review (Paragraph 1.4.4)

98. Paragraph 1.4.4 authorizes a participant to seek, from the hearing body, interlocutory review of any ruling issued by the hearing officer.[62] We accept paragraph 1.4.4 and direct changes. First, we note that the hearing officer will be required to file a report with the hearing body within 14 days of a petition for interlocutory review. However, this requirement, as drafted, fails to specify the content or purpose of such a report. Accordingly, we direct NERC to clarify this matter. We also find that paragraphs 1.4.3 and 1.4.4 fail to describe the standard to be applied by the hearing body in considering a petition for interlocutory review.[63] While we do not require NERC to adopt the Commission's standard, some limitations on the right to seek an interlocutory appeal are appropriate for the purpose of deterring unduly dilatory maneuvers on the part of litigants. Accordingly, we direct NERC to propose an appropriate standard.

10. *Ex Parte* Communications (Paragraphs 1.4.5 and 1.4.7)

99. The *April 19 Order* found that when prohibited *ex parte* communication takes place between a party and a member of the hearing body or upon a specific showing of

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[62] Petitions to rehear or reconsider the hearing body's action taken on interlocutory review would not be allowed pursuant to paragraph 1.4.4.

[63] *Cf.* 18 C.F.R.§ 385.715(a) (requiring that an interlocutory appeal be supported by a finding made by the presiding officer, or the motions Commissioner, that extraordinary circumstances exist which make prompt Commission review of the contested ruling necessary to prevent detriment to the public interest or irreparable harm to any person).

potential bias, another party to the hearing must be permitted to request recusal of the hearing body member.[64] NERC, in response, states that paragraph 1.4.7 contains the provisions concerning prohibited *ex parte* communications, while paragraph 1.4.5 allows for any participant in a hearing to file a motion for disqualification or recusal of a hearing officer, technical advisor or member of the hearing body on grounds of (among others) an *ex parte* communication prohibited by paragraph 1.4.7. NERC states that paragraph 1.4.5 also sets forth the procedures for consideration of and ruling on such motions.

100. EEI/NRECA argue that paragraph 1.4.7 fails to specify whether communications between a hearing officer and compliance staff, or a technical advisor and compliance staff, are prohibited.

101. We accept paragraphs 1.4.5 and 1.4.7 but direct certain changes. Paragraph 1.4.7(a) prohibits certain specified communications by a hearing officer or technical advisor with any "person." However, because the NERC hearing procedures define a "person" to include individuals,[65] this prohibition would apply to the specified communications between a hearing officer or technical advisor and individual compliance staff members. Thus, the proposed language already addresses the concern expressed by EEI/NRECA. However, we find that paragraph 1.4.7(d) fails to require that a notice of *ex parte* communication include a listing of each person who made or received the prohibited communication. Accordingly, we direct NERC to amend this provision.

11. <u>Waiver of Time Limits (Paragraph 1.5.1)</u>

102. Paragraph 1.5.1 states that "[a] Registered Entity that elects the full hearing procedure . . . shall be deemed to have waived the time limit requirements, if any, in the NERC Rules of Procedure." Paragraph 1.5.1 is unsupported and overly vague. NERC may, if it wishes, revise and further support the need for this provision in its compliance filing. Otherwise, it should be deleted.

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[64] *April 19 Order*, 119 FERC ¶ 61,060 at P 155.

[65] *See* NERC hearing procedures at paragraph 1.1.5.

12. **Experts (Paragraph 1.5.6)**

103. Paragraph 1.5.6 requires that any expert called upon to testify or consult in a proceeding sign a confidentiality agreement "appropriate to the level of involvement in the proceeding."

104. We reject as unnecessary paragraph 1.5.6. NERC fails to justify the need for this provision given that fact that: (i) hearings will generally be closed to the public (*see* paragraph 1.2.13); and (ii) the issuance of protective orders applicable to participants is addressed elsewhere (*see* paragraph 1.5.10). In this regard, we interpret the term "expert" to be included in the term "participant."[66] NERC may, if it wishes, further support the need for this provision in its compliance filing. Should NERC seek to retain this provision, NERC must explain: (i) why separate confidentiality agreements are necessary for experts, versus participants; and (ii) the meaning of the phrase "appropriate to the level of involvement in the proceeding."

13. **Documents to be Made Available for Inspection and Copying (Paragraph 1.5.7(a))**

105. The *April 19 Order* found that the NERC hearing procedures fail to address the right of a registered entity to seek discovery from the compliance enforcement authority.[67]

106. NERC, in response, states that paragraph 1.5.7(a) complies with the *April 19 Order*. NERC states that under paragraph 1.5.7(a)(1), "unless otherwise provided by this Rule," the compliance enforcement authority is required to make available for inspection and copying by the respondent, within five business days after issuance of the notice of hearing, non-inclusive of any documents already provided to the respondent (e.g., as part of the notice of alleged violation), documents prepared or obtained by the compliance staff "in connection with the investigation that led to the institution of proceedings." Paragraph 1.5.7(a)(2) requires the compliance staff to promptly inform the hearing officer and each other respondent if, after the issuance of a notice of hearing, a request for

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[66] *See* NERC hearing procedures at paragraph 1.1.5 (defining "participant" as "any Person who is allowed or required to participate in a proceeding conducted pursuant to these Hearing Procedures.").

[67] *April 19 Order*, 119 FERC ¶ 61,060 at P 147.

information related to the same investigation is issued by the compliance staff. Finally, paragraph 1.5.7(a)(3) provides that "[n]othing [in this paragraph] shall limit the discretion of the Compliance Enforcement Authority to make any other document available to the Respondent or the authority of the Hearing Officer to order the production of any other documents or information by any Participant."

107. New York ISO requests that section 1.5.7(a)(1) be revised to extend the right given to respondents (to inspect and copy documents in the custody of the compliance staff) to any other party that is a participant in the hearing. Georgia Coop argues that the phrase "[u]nless otherwise provided by this Rule" requires clarification.

108. We accept paragraph 1.5.7(a) and direct modifications. First, we require NERC to revise paragraph 1.5.7(a)(1) and (2) to require the production of documents prepared or obtained by compliance staff through *any* compliance process that led to the institution of proceedings (e.g., through a compliance audit or spot check), not only documents prepared or obtained in connection with an "investigation."[68] We also require NERC to amend paragraph 1.5.7(a) to clarify that compliance staff need not make available to a participant documents that are exact copies of documents the participant previously provided to compliance staff.[69] In most cases, the participant will already possess these documents. We also agree with Georgia Coop that the provision proposed at paragraph 1.5.7(a)(1) (i.e., the requirement that the specified documents will be made available "[u]nless otherwise provided by this Rule") is ambiguous and otherwise unsupported. We direct NERC to explain or delete this provision.

109. We reject New York ISO's request that paragraph 1.5.7(a) be revised to confer upon all "participants" the rights bestowed by this provision on "respondents." While New York ISO's argument may, in a given case, have merit, its concerns regarding the rights and needs of participants will be best addressed on a case-by-case basis. First, we note that the primary interest any participant will have in inspecting and copying documents is access to documents that may refer to that participant, that tend to exculpate

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[68] We note that the required language changes appear at paragraphs 1.5.7(a)(1), 1.5.7(a)(1)(D) and 1.5.7(a)(2).

[69] Paragraph 1.5.7(a)(1) addresses this issue only in part by stating that "the documents made available for inspection and copying need not include any documents provided to the Respondent. . . ."

it, or that otherwise bear on any aggravating or mitigating circumstances relating to that participant's role in the proceeding. These interests are clearly legitimate.

110. However, other documents that could be required to be made available will, in most cases, be irrelevant as it relates to such a participant's legitimate interests and needs. In addition, these documents may, in a given case, include confidential material that warrants protection. Accordingly, in proceedings with more than one participant (other than compliance staff), the hearing officer, or the hearing body, should decide these matters. The hearing officer, or the hearing body, should oversee compliance staff's proposed designation of documents and the execution and enforcement of protective orders.

14. <u>Withholding of Documents (Paragraph 1.5.7(b) and (c))</u>

111. Paragraphs 1.5.7(b) and (c) address the circumstances and conditions pursuant to which compliance staff will be permitted to withhold a document from inspection and copying by the respondent. Among other things, paragraph 1.5.7(b)(1) authorizes the withholding of documents that are privileged and documents that constitute compliance staff counsel's work product. Paragraph 1.5.7(b)(2) also states that "[n]othing in [paragraph 1.5.7(b)(1)] authorizes [compliance staff] to withhold a document, or a part thereof, that contains exculpatory evidence." In addition, paragraph 1.5.7(c) provides that a dispute over a withheld document will be resolved by the hearing officer.

112. EEI/NRECA and New York ISO request that section 1.5.7(b)(2) be revised to impose an affirmative obligation on compliance staff to produce any exculpatory evidence in its possession, i.e., any documents, not subject to privilege, that would assist the respondent in showing that it was not responsible (or that someone else was responsible) for a Reliability Standard violation.

113. We accept paragraphs 1.5.7(b) and (c) and direct modifications. First, we require NERC to revise paragraph 1.5.7(b)(2), as it relates to compliance staff's obligation to make exculpatory evidence available. This provision must be revised to provide that compliance staff's obligation does not operate as a limitation on the privileges specified in paragraph 1.5.7(b)(1). We note, in this regard, that the attorney client privilege is absolute. In addition, the work product doctrine permits disclosure of attorney work product only upon a showing of substantial need.[70] However, we reject, as unnecessary,

[70] *See* 18 C.F.R. § 385.402(b).

EEI/NRECA's and New York ISO's requested clarifications. The rights and obligations advocated by these intervenors, namely the affirmative obligation to provide exculpatory evidence that is not otherwise privileged, is fully encompassed within paragraph 1.5.7(b)(2), as required to be revised herein.

114. We require NERC to revise paragraph 1.5.7(c), regarding compliance staff's obligation to compile a list of documents withheld. This obligation should apply in every case without exception, without the need for a motion or the involvement of the hearing officer. In every case, compliance staff must provide this list at the time that it is required to make documents available.[71] This obligation must also apply to a respondent that is required to make documents available. This practice, our experience has shown, reduces the number of discovery disputes that might otherwise arise and allows for the speedier resolution of any disputes that remain.

15. Failure to Produce Documents (Paragraph 1.5.7(g))

115. Paragraph 1.5.7(g) provides, in relevant part, that "[i]n the event that a document required to be made available to a Respondent . . . is not made available by [compliance staff], no rehearing or amended decision of a proceeding already heard or decided shall be required unless Respondent establishes that the failure to make the document available was not harmless error."

116. Georgia Coop argues that the burden of proof, in this instance, should be placed on the party that has failed to carry out its obligations, i.e., on compliance staff, not on the respondent. NERC, in its answer, argues that Georgia Coop's proposed allocation of this burden could lead to relitigation based on inconsequential failures to produce. NERC adds that regardless, it is ultimately within the power of the hearing body to resolve these matters fairly on a case-by-case basis.

117. We accept paragraph 1.5.7(g) and direct modifications. First, we agree with Georgia Coop that the burden of proving harm should not be placed on the respondent when compliance staff fails to produce a document it was required to produce. The risk in this regard (and thus the incentive to produce required documents) should be placed on the party with the obligation to produce. Accordingly, we direct NERC to revise paragraph 1.5.7(g) as it relates to the burden of proof on this issue. We also require

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[71] *Compare id.* § 385.410(a)(2).

NERC to revise paragraph 1.5.7(g) to apply to any participant that fails to produce a document it was required to produce, not just the compliance staff.

16. Discovery Procedures (Paragraph 1.5.8)

118. The *April 19 Order* found that the NERC hearing procedures fail to provide specific rules for discovery procedures and disputes.[72] The *April 19 Order* also required NERC to vest authority over discovery disputes in the hearing body.

119. NERC, in response, states that paragraph 1.5.8 complies with the *April 19 Order*. Paragraph 1.5.8 provides that "[i]n addition to the production of documents by [compliance staff] for inspection and copying by Respondent pursuant to paragraph 1.5.7, the Participants shall be entitled to utilize all other discovery methods commonly used in civil courts, including requests for production of documents, written interrogatories, requests for admission, and depositions of witnesses under oath." Paragraph 1.5.8 also requires that the scope of discovery be taken up by the hearing officer at a prehearing conference and that all discovery disputes be resolved by the hearing officer.

120. New York ISO, EEI/NRECA and Georgia Coop object to the scope and breadth of paragraph 1.5.8. First, New York ISO and EEI/NRECA argue that paragraph 1.5.8 implicitly (and unnecessarily) assumes that a discovery dispute will arise in every proceeding (by requiring a prehearing conference) and fails to take into account that discovery plans cannot always be fully developed prior to the commencement of discovery. New York ISO proposes that this section be revised to require hearing officer involvement in discovery matters only when discovery disputes arise. In addition, New York ISO proposes that standard discovery procedures and timelines be adopted for use in all proceedings, as based on the Commission's hearing procedures.

121. EEI/NRECA also argue that a participant's rights to utilize discovery methods commonly used in "civil courts" should reference, instead, "courts of the United States." EEI/NRECA assert that this revision is consistent with the use of this phrase in paragraphs 1.6.10(6) and 1.6.11 and avoids the implication that paragraph 1.5.8 refers only to jurisdictions that apply civil, as opposed to "common," law.

122. New York ISO, EEI/NRECA and Georgia Coop also argue that paragraph 1.5.8 fails to address the need for compelling third parties to participate.[73] To address this

[72] *April 19 Order*, 119 FERC ¶ 61,060 at P 148.

asserted need, New York ISO proposes that the Commission develop a process by which subpoenas could be issued by the Commission for the production of witnesses or documents. EEI/NRECA add that while recourse to subpoena power would likely be rare, NERC should be required to clarify the procedures to be used should it or a Regional Entity seek to compel the participation of a third party.

123. NERC, in its answer, responds to intervenors' arguments regarding the asserted need for NERC procedures authorizing the hearing body to compel third parties to participate. NERC argues that it may not have this authority, particularly as it relates to individuals, such as former employees of a registered entity. NERC argues, instead, that such authority would need to be exercised by the Commission.

124. We accept paragraph 1.5.8 and direct modifications. First, we agree with New York ISO and EEI/NRECA that discovery matters need only be addressed by the hearing officer if, and as, a dispute arises. This degree of supervision has proven effective with respect to litigation before the Commission. As such, paragraph 1.5.8 should be revised to eliminate the requirement that a prehearing discovery conference be held in every case. We also require NERC to revise paragraph 1.5.8 to eliminate the reference made to the discovery practices of "civil courts." This reference is not helpful and could lead to disputes or confusion where practices conflict or change over time. In addition, we agree with New York ISO that paragraph 1.5.8 should be revised to include standard discovery procedures and timelines. NERC may, if it wishes, adopt or incorporate by reference the Commission's procedures for discovery relating to hearings before administrative law judges, as may be applicable.

125. We reject, as unnecessary, intervenors' requests for additional procedures compelling persons to testify or to produce documents. Paragraph 1.5.8 entitles participants to use a broad range of discovery methods, including the use of deposition testimony provided under oath. Paragraph 1.6.16 also allows a participant to call adverse participants, or their employees or agents, to provide oral testimony on the participant's behalf. Section 39.2(b) of the Commission's regulations provides that all entities subject

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[73] New York ISO asserts that it is likely that this need will arise in those circumstances where a respondent can legitimately claim that a third party either is responsible or bears some responsibility for the circumstances that have led to the issuance of a notice of alleged violation. New York ISO submits that, similarly, this need could arise where a third party could be called upon as a witness in the case or in the custody of relevant documents.

to the Commission's jurisdiction pursuant to FPA section 215 must comply with NERC's rules, which include the NERC hearing procedures.[74] We will address these matters, then, on a case-by-case basis, using our existing authority to compel the production of documents and testimony, as necessary.

17. Protective Orders (Paragraph 1.5.10(b)

126. Paragraph 1.5.10(b) identifies six "types of information" that, once disclosed through discovery among participants, will be considered entitled to protection from public disclosure through a protective order, including audit work papers and investigative files or documents that would disclose investigative techniques. However, paragraph 1.5.7(b)(1), as discussed above, authorizes compliance staff to withhold these documents from production with, or without, the existence of a protective order.

127. We accept paragraph 1.5.10(b) and direct modifications. As drafted, paragraph 1.5.10(b) may create confusion regarding the types of information intended to be protected under paragraph 1.5.7(b)(1). Accordingly, we direct NERC to clarify the scope of documents subject to paragraph 1.5.10(b) (e.g., with an appropriate cross-reference to paragraph 1.5.7(b)(1)). As a general matter, documents protected from disclosure by paragraph 1.5.7(b)(1) will only be produced if compliance staff voluntarily agrees to do so, if they are redacted to remove protected information, or if non-protected portions of these documents are required to be produced as exculpatory evidence.

18. Burden of Persuasion and Receipt of Evidence (Paragraph 1.6.2)

128. The *April 19 Order* required that the NERC hearing procedures address the allocation of the burden of persuasion and the standard of proof, required that the compliance enforcement authority bear the burden of persuasion at hearing, and directed that the NERC hearing procedures adopt a preponderance of the evidence standard applicable to findings made by the hearing body.[75]

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[74] *See* 18 C.F.R. § 39.2(b) (2007).

[75] *April 19 Order*, 119 FERC ¶ 61,060 at P 146. This standard is consistent with the standard of review for the Commission's issuance of an order under the FPA: that the order is supported by substantial evidence. *See Steadman v. SEC*, 450 U.S. 91, 99-102

(continued…)

129. In response, NERC has revised paragraph 1.6.2 as follows:

> The standard of proof in the hearing shall be by a preponderance of the evidence. The burden of persuasion on the merits of the hearing shall rest upon Compliance Staff alleging noncompliance with a Reliability Standard, proposing a Penalty, opposing a Registered Entity's Mitigation Plan, or requiring compliance with a Remedial Action Directive. Therefore, in all proceedings Compliance Staff shall open and close.

130. EEI/NRECA assert that the placement of this provision creates confusion as to whether the substance addressed (i.e., burden of proof and order of receiving evidence) applies throughout the proceeding, or only with reference to an evidentiary hearing. EEI/NRECA propose that this provision be relocated to a new section 1.4.10.

131. We accept paragraph 1.6.2. However, we agree with EEI/NRECA that, to avoid confusion, the first two sentences of paragraph 1.6.2 should be located in an introductory provision of the NERC hearing procedures and that any conforming changes be made, consistent with this directive.

19. Admissibility of Evidence (Paragraph 1.6.11)

132. Paragraph 1.6.11 addresses admissibility of evidence and objections to the admissibility of evidence. EEI/NRECA propose that section 1.6.11 be revised to permit the hearing officer to exclude from evidence any irrelevant, immaterial, or unduly repetitious material (an authorization included in Rule 509 of the Commission's Rules of Practice and Procedure).[76]

133. We accept paragraph 1.6.11. We reject, as unnecessary, EEI/NRECA's proposed revision. Paragraph 1.6.11 limits the hearing officer's authority to exclude evidence except in response to a motion or objection by a participant. We are not persuaded that this provision, which supports the development of a full, inclusive record, will be prejudicial or otherwise harmful to any participant's interests.

(1981); *see also* FPA section 313(b) (the Commission's findings as to facts, if supported by substantial evidence, shall be conclusive).

[76] 18 C.F.R. § 385.509 (2007).

20. Examination of Adverse Participants (Paragraph 1.6.16)

134. Paragraph 1.6.16 provides, in relevant part, that "[a]ny Participant may call any adverse Participant, or any employee or agent thereof, during the evidentiary hearing to provide oral testimony on the Participant's behalf, and may conduct such oral examination as though the witness were under cross-examination." EEI/NRECA argue that paragraph 1.6.16 fails to specify the manner in which this right may be exercised.

135. We accept paragraph 1.6.16. With respect to EEI/NRECA's concern, we are not persuaded that a clarification is required, given the discretion that the hearing body may exercise with respect to the conduct of the evidentiary hearing, and given the Commission's authority to structure the hearing in the event it authorizes participants other than the Regional Entity compliance staff and any respondent registered entity.

21. Deadline for Contesting a Remedial Action Directive (Paragraph 1.9)

136. Paragraph 1.9.1 provides that a registered entity may contest a remedial action directive by filing a written notice with the clerk of the compliance enforcement authority "within two (2) days following issuance of the Remedial Action Directive."

137. New York ISO argues that paragraph 1.9 should be revised to make clear that a registered entity will be required to file its required notice within two *business* days, not consecutive calendar days, following the *receipt*, not the issuance, of the remedial action directive.[77] New York ISO also argues that paragraph 1.9.2 should change the dates for prehearing conferences and evidentiary hearings to refer to business days rather than days, for purposes of consistency. New York ISO next contends that paragraph 1.9.2 should grant authority to the hearing body or hearing officer to permit flexibility for time periods specified therein, as may be necessary.

138. We accept paragraph 1.9. However, we agree that the two-day deadline for a registered entity to contest a remedial action directive should reflect business days and should be tied to the registered entity's actual receipt of the remedial action directive. We also agree that the time periods in paragraph 1.9.2 for the prehearing conference and evidentiary hearing should refer to business days. Nevertheless, we reject New York ISO's additional request, i.e., that paragraph 1.9 be further revised to grant express

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[77] NERC, in its answer, agrees.

authority to the hearing body or hearing officer to change the time periods for prehearing conferences and evidentiary hearings, as may be necessary. Paragraph 1.9.2 refers to these deadlines as "guidelines." As such, this provision vests sufficient discretion in the hearing officer to change, or modify, as necessary, all deadlines otherwise stated by paragraph 1.9.2.

F. Regional Entity Delegation Agreement Revisions

139. For the reasons discussed below, we accept the amended and restated Regional Entity Delegation Agreements and direct certain modifications to be made in a compliance filing within 120 days. Among other things, these required modifications include conforming changes, consistent with the *pro forma* revisions addressed above.

1. TRE Delegation Agreement Revisions

a. *April 19 Order*

140. The Commission, in the *April 19 Order,* accepted the TRE Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and TRE to make specific changes to the TRE Delegation Agreement. With respect to Exhibit E (Funding), the *April 19 Order* required that NERC and TRE address TRE's obligations to: (i) transfer the money it collects to NERC; and (ii) not use its position as a billing and collection agent to unduly influence NERC's decisions.[78] The *April 19 Order* also required TRE to further support its deviation from the *pro forma* provision requiring NERC to fund TRE's statutory reliability regulator-related costs on a quarterly basis. Finally, the *April 19 Order* required that the TRE Exhibit E identify all non-statutory activities, if any, engaged in by TRE and clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities.[79]

b. NERC's and TRE's Response

141. NERC and TRE state that the amended and revised TRE Delegation Agreement complies with the requirements of the *April 19 Order*. In addition, NERC and TRE propose revisions to the NERC *pro forma* CMEP and CMEP hearing procedures included

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[78] *April 19 Order*, 119 FERC ¶ 61,060 at P 255.

[79] *Id.* P 256.

in this filing, as applicable to the TRE CMEP and TRE hearing procedures. We discuss these proposed revisions below.

c. Commission Determination

142. We accept the amended and restated TRE Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and TRE to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and TRE develop certain modifications to their agreement, as discussed below.

i. Exhibit D Revisions (Compliance Monitoring and Enforcement)

143. NERC states that, in addition to the revisions required by the *April 19 Order*, the TRE Delegation Agreement has been revised, at Exhibit D, to reflect TRE's utilization of the Public Utility Commission of Texas (Texas Commission) as its hearing body. Among other things, TRE Exhibit D states that TRE has modified the CMEP, at section 5.5, to specify that a registered entity may appeal to NERC a decision of TRE's chief compliance officer, rather than a decision of TRE's hearing body. Attachment 1 to TRE's Exhibit D is the TRE hearing process, while Attachment 2 is TRE's Rules of Procedure, which incorporate many of the Texas Commission's procedural rules.

144. The TRE hearing process, at section 10.0, permits TRE's chief compliance officer as much as 79 days from the date that a registered entity is required to give notice of its challenge to a remedial action directive to issue a summary written decision on the disputed directive, while paragraph 1.9.2 of the NERC hearing procedures allows a maximum of 19 days, plus the number of days for the hearing on the dispute, for issuance of the summary written decision. Section 1.1.5 of the TRE Rules of Procedure, as proposed, defines the term "Cybersecurity Incident" differently from the NERC hearing procedures. Section 1.1.5 also modifies NERC's definition of "mitigation plan" in paragraph 1.1.5 of the NERC hearing rules to state that a mitigation plan is "usually required," rather than "required," if a registered entity violates a Reliability Standard. Section 1.2 of TRE's Rules of Procedure, which sets forth a "hold harmless" provision against liability of the TRE for its hearing process, deviates from the comparable provision of the NERC hearing procedures by omitting, as an act that will *not* be held harmless, breaches of confidentiality.

145. TRE's hearing process and Rules of Procedure also omit the shortened hearing procedure set forth in paragraph 1.3.2 of the NERC hearing procedures. Finally, section 1.4.2 of TRE's Rules of Procedure deviate from paragraph 1.4.6 of the NERC hearing

procedures by omitting the requirement that the employment history of a technical advisor be disclosed.

146. We accept the revised Exhibit D and Attachments 1 and 2 and require certain modifications, as discussed below. We accept the proposed TRE deviation at section 10.0 regarding the procedural deadlines applicable to the issuance of a summary written decision on a disputed remedial action directive. In this regard, we note section 10.0's stated purpose of providing an expedited hearing process for contested remedial action directives. We are confident that the Texas Commission and TRE's chief compliance officer will act within the prescribed section 10.0 deadlines.[80]

147. We also accept TRE's exclusion of the *pro forma* shortened hearing procedures from the provisions of Attachments 1 and 2 to its Exhibit D. We observe that the Texas Commission's rules provide for an expedited process "when necessary to prevent or mitigate imminent harm or injury to persons or to real or personal property."[81] We agree that this process adequately addresses the circumstances in which an expedited process would be appropriate, in addition to TRE's expedited process for hearings on disputed remedial action directives.

148. We require that the TRE Rules of Procedure adopt paragraph 1.1.5 of the NERC hearing procedures, regarding the definition of the term "mitigation plan," in place of TRE's proposed deviation. The TRE Hearing Procedures, as proposed, state that a mitigation plan is "usually required" if a registered entity violates a Reliability Standard.[82] In the *April 19 Order*, the Commission accepted a proposal similar to TRE's proposed deviation, as incorporated in the WECC CMEP section 1.1.11 (describing a mitigation plan as "usually" required for a violation). The Commission did so, however,

[80] We also require TRE to revise the reference in section 10.0(5) to the chief compliance officer's "summary written recommendation." Section 10.0(6) refers correctly to the chief compliance officer's "summary written decision." For consistency, both sections should use the same language.

[81] *See* PUCT, Ch. 22, Procedural Rules at section 22.78(c).

[82] *Compare* NERC CMEP at section 1.1.11.

based on WECC's support for this allowance.[83] By contrast, TRE has not provided any justification for its proposed deviation.[84]

149. The TRE Rules of Procedure definition of the term "Cybersecurity Incident," at section 1.1.5, deviates from the *pro forma* term, which is based on both a statutory definition and the Commission's regulations.[85] TRE's proposed definition also uses terms (e.g., "Physical Security Perimeter" and "Electronic Security Perimeter") that do not appear in the statutory or regulatory definitions and that are not otherwise defined. Because TRE has not supported its proposed deviation, we direct TRE to adopt the *pro forma* term or justify its proposed deviation.

150. We instruct TRE to modify the proposed deviation at section 1.2 of the TRE Rules of Procedure, regarding the hold harmless assurances applicable to the acts of the compliance enforcement authority. Section 1.2 deviates from the *pro forma* provision by omitting, as an act that will *not* be held harmless, breaches of confidentiality.[86] However, TRE fails to support this proposed deviation with an explanation regarding why a breach of confidentiality is not germane to this provision. In fact, at section 1.2(B), TRE's Exhibit D addresses confidentiality by listing the methods that can be used for protecting confidential information. Unauthorized public disclosure of such information by the compliance enforcement authority in violation of this provision could harm those who sought confidential treatment. As such, section 1.2 of TRE's Rules of Procedure should not extend its hold harmless protection to acts that violate a method listed in section 1.2(B) of TRE's Exhibit D.

[83] *April 19 Order,* 119 FERC ¶ 61,060 at P 481 and P 498.

[84] *Id.* P 161 (because submission of mitigation plans is "vital" to achieving the CMEP's objective of redressing the effects of violations of Reliability Standards and preventing future, similar violations, the Commission rejects a proposal that submission of a mitigation plan should not always be required for a violation).

[85] *See* FPA section 215(a)(8) and 18 C.F.R. § 39.1 (2007).

[86] The NERC hearing procedures, at paragraph 1.2.15, provide, in relevant part, that "[t]his 'hold harmless' provision does not extend to matters constituting gross negligence, intentional misconduct or breach of confidentiality."

151. Finally, we find unsupported the TRE proposed deviation at section 1.4.2 of the TRE Rules of Procedure, omitting the *pro forma* paragraph 1.4.6 disclosure requirement regarding a technical advisor's employment history. We direct NERC and TRE to adopt the *pro forma* requirement.

ii. <u>Exhibit E Revisions (Funding)</u>

152. NERC states that the TRE Exhibit E has been revised consistent with the requirements of the *April 19 Order*. With respect to the Commission's requirement that the TRE Exhibit E address TRE's obligation to transfer the money it collects to NERC, NERC states that ERCOT, not TRE, will be the entity responsible for billing assessments, collections, and remittances. NERC states that the TRE Exhibit E, at section 3, has been revised accordingly. NERC argues that TRE will not be in a position to influence NERC's decisions. NERC states that the TRE Exhibit E has also been revised at section 3 to state that NERC will fund TRE's costs for statutory functions on a quarterly basis, within ten business days after receiving the remittance from ERCOT (replacing the existing two-day deadline). NERC states that the TRE Exhibit E has also been revised to include a list of TRE's non-statutory activities. In addition, NERC states that TRE will implement a time recording and expense management system to track employee time and expenses incurred for non-statutory activities.

153. We accept, with the following modifications, the proposed Exhibit E revisions addressing TRE's obligation to transfer the money it collects to NERC. The TRE Delegation Agreement is a contract between TRE and NERC and, therefore, TRE remains ultimately responsible for ensuring that the transfer of funds is made in a timely manner and that the appropriate financial safeguards are in place. Accordingly, we direct NERC and TRE to revise TRE's Exhibit E to include the *pro forma* financial safeguards. The TRE Exhibit E must adopt the *pro forma* assurance that money ERCOT collects will be transferred to NERC on a timely basis. In addition, because ERCOT, as an ERO-regulated entity, has agreed to act as the billing and collection agent, ERCOT must adopt the financial safeguards as well as a statement that it will transfer money to NERC on a timely basis. The transfer of this function from a Regional Entity to an RTO does not necessarily eliminate the Commission's concern that a registered entity not use its position to unduly influence NERC's decisions.

154. The *ERO Certification Order* directed NERC to adopt appropriate safeguards in the *pro forma* base Delegation Agreement to ensure that, when a Regional Entity performs billing and collection functions on behalf of NERC: (i) the Regional Entity

transfers the money to NERC in a timely manner, and (ii) the Regional Entity does not use its position as billing agent and collector to unduly influence NERC's decisions. In the *April 19 Order*, the Commission stated that to the extent an entity agrees to act as the collection agent, *these* safeguards must be addressed in that context as well.[87]

155. ERCOT and TRE request that the Commission review and approve only the ERCOT bylaws cited or quoted in Exhibit B to the amended and restated TRE Delegation Agreement. ERCOT and TRE also request a finding that the remainder of the ERCOT bylaws are not Regional Entity rules subject to the Commission's reliability regulations. In the *Delegation Agreements Rehearing Order*, the Commission addressed a similar issue raised by SPP.[88] SPP, in its request for clarification of the *April 19 Order*, had argued that the portions of its bylaws that do not relate to NERC's statutory responsibilities need not and should not be submitted to NERC for NERC's approval. The Commission, in response, recognized that SPP, as a hybrid organization (i.e., as a Regional Entity and an RTO), would have bylaw provisions that would be subject to different statutory schemes.

156. TRE's status, in relation to ERCOT, presents a similar set of facts. Accordingly, based on the Commission's prior findings, we clarify, here, that TRE will be required to submit to NERC, for NERC's approval, any revision to the ERCOT bylaws that relate to TRE's Regional Entity functions. In addition, any other proposed revisions to the ERCOT bylaws, even those that may relate to non-Regional Entity matters, must also be served on NERC. While NERC will not be required, or authorized, to approve revisions that address matters beyond its authorized ERO responsibilities, NERC has the obligation to review all proposed bylaw revisions for the purpose of determining what may, or may not, be subject to its authorized oversight.

2. MRO Delegation Agreement Revisions

a. *April 19 Order*

157. The Commission, in the *April 19* Order, accepted the MRO Delegation Agreement. The Commission also directed changes consistent with the required revision to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and

[87] 116 FERC ¶ 61,062 at P 169.

[88] *See Delegation Agreements Rehearing Order*, 120 FERC ¶ 61,260 at P 13-20.

MRO to make specific changes to the MRO Delegation Agreement. Among other things, the *April 19 Order* found that membership fees must be identified in MRO's annual budget and business plan.[89] The *April 19 Order* also directed NERC and MRO to identify, at Exhibit E (Funding), data gathering activities as a statutory function as well as all non-statutory activities, if any, engaged in by MRO. In addition, the Commission required that the MRO Exhibit E clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities.[90]

b. NERC's and MRO's Response

158. NERC and MRO state that the amended and restated MRO Delegation Agreement complies with the requirements of the *April 19 Order*. With respect to fees, NERC and MRO state that MRO does not charge an annual membership fee but does charge a $1,000 initiation fee covering the administrative costs of new members. NERC and MRO state that the initiation fee does not apply to small end use load members. With respect to Exhibit E, NERC states that the MRO Exhibit E has been revised to conform with the *pro forma* Delegation Agreement and lists, at Exhibit E, section 1, "necessary data gathering activities" as one of MRO's delegated activities to be funded through the ERO funding mechanism. NERC and MRO add that, in conformance with the *pro forma* Delegation Agreement, Exhibit E now includes section 5, addressing the budget and funding for MRO's non-statutory activities.

159. NERC and MRO state that the amended and restated MRO bylaws, in addition to the compliance responses, provide clarification to MRO's existing bylaw process and procedure, and conform to corporate statutes. MRO proposes a bylaw change that would deny voting privileges for a sector-appointed alternate serving on the MRO board. Further, alternates may only participate in board meetings when, and if, they are allowed to do so by the board.

c. Commission Determination

160. We accept the amended and restated MRO Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and MRO to revise their agreement, within 120 days of the date of this order, consistent with the

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[89] *April 19 Order*, 119 FERC ¶ 61,060 at P 274.

[90] *Id.* P 283-84.

modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and MRO develop certain modifications to their agreement, as discussed below.

161. MRO's Regional Reliability Standards Process Manual defines "sub-regional variance," in relevant part, as "[a]n aspect of a Reliability Standard . . . that applies only within a particular regional entity sub-region." However, we are concerned that the proposed definition could be misinterpreted as allowing exemptions that establish a level of reliability less than that set by the continent-wide Reliability Standard. In contrast, the Commission in Order No 672 limited regional differences to those that are: (i) more stringent than the continent-wide standard or (ii) necessitated by a physical difference in the Bulk-Power System.[91] Accordingly, we direct MRO to clarify the definition of sub-regional variance consistent with Order No. 672.

162. We disagree with MRO that its $1,000 initiation fee is not a membership fee. All fees required for membership, whether they apply one time or on an annual basis, are membership fees. This includes administration, initiation or registration fees. Therefore, we find MRO's proposal to assess Regional Entity members a $1,000 initiation fee must be identified and justified in its annual budget and business plan.

163. In addition, we find that Exhibit E, section 5 does not include a list of MRO's non-statutory activities. Exhibit E, section 5 also does not identify the procedures that MRO will follow to ensure that funding applicable to its statutory activities will be kept separate from its funding for non-statutory activities. We direct MRO and NERC to revise Exhibit E, section 5 to address these deficiencies.

3. NPCC Delegation Agreement Revisions

a. *April 19 Order*

164. The Commission, in the *April 19 Order*, accepted the NPCC Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and NPCC to make specific changes to the NPCC Delegation Agreement.

165. With respect to Exhibit D (Compliance Monitoring and Enforcement), the *April 19 Order* accepted, subject to conditions, the NPCC CMEP provision designating

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[91] Order No. 672, FERC Stats. & Regs. ¶ 31,204 at P 291.

NPCC's independent compliance staff as the entity responsible for initial determinations for all compliance submittals, but directed that the NPCC CMEP describe how NPCC will conduct other compliance activities.[92] The *April 19 Order* also required that the NPCC CMEP identify the technical committees that NPCC's compliance staff would be authorized to consult in making its initial determinations and explain whether these committees would be bound by CMEP policies.[93]

166. With respect to Exhibit E (Funding), the *April 19 Order* required that NERC and NPCC identify all non-statutory activities, if any, engaged in by NPCC and clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities.

b. <u>NERC's and NPCC's Response</u>

167. NERC and NPCC state that section 3 of Exhibit D has been revised as required. With respect to the requirement that the NPCC CMEP identify all staff compliance activities, NERC and NPCC state that NPCC compliance staff will be authorized to conduct spot checks to verify self certifications and to conduct compliance violation investigations. Compliance staff will review event analysis reports produced by event analysis teams after they have completed their work. Also, compliance staff will make penalty determinations in connection with its review process after issuing a notice of alleged violation.

168. With respect to technical committees, NERC and NPCC state that section 3 has been revised to include a description of each such committee. With respect to the required division of functions between the compliance staff and the compliance committee, NERC and NPCC state that section 3.0 has been revised to include the necessary description. NPCC also states that the stakeholder NPCC compliance committee shall serve as NPCC's hearing body. An NPCC compliance staff member shall serve as chairman of the committee.

169. NERC and NPCC also state that the NPCC Exhibit E has been revised to include the new text, at section 5, as included in the revised *pro forma* Exhibit E. NERC and

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[92] *April 19 Order*, 119 FERC ¶ 61,060 at P 311-12.

[93] *Id.* P 312.

NPCC add that the NPCC Exhibit E also describes the manner in which NPCC non-statutory functions will be funded.

c. Commission Determination

170. We accept the amended and restated NPCC Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and NPCC to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and NPCC develop certain modifications to their agreement, as discussed below.

171. NPCC proposes a revision to section 3.3 of the NPCC CMEP, which authorizes spot-checking for the limited purpose of verifying self-certifications. Section 3.3 is more limited than the parallel provision of the NERC *pro forma* CMEP.[94] Accordingly, because NPCC has not provided any reason for this deviation, we direct NPCC to revise section 3.3 to conform to NERC's *pro forma* CMEP.

172. Section 3.0 of the NPCC CMEP, as proposed, states that a compliance violation investigation will be conducted "upon completion of an initial event analysis." However, these investigations should be commenced as soon as evidence of a possible violation of a reliability standard is discovered, whether during an event analysis or through other means. Accordingly, we direct NERC and NPCC to revise this provision.

173. NPCC has not described with specificity the difference between an "initial determination" of violation that its compliance staff is to make and a "final compliance determination" that compliance staff would make after consulting with the appropriate NPCC technical committees. In particular, NPCC states that its compliance staff will make a penalty determination in connection with this review process after issuing a notice of alleged violation. However, this procedure is inconsistent with CMEP section 5.1, which provides that a notice of alleged violation is to include a proposed penalty or sanction. Because NPCC has not justified this deviation from *pro forma* section 5.1, we direct NPCC to clarify the review procedures set forth in section 3.0 of its Exhibit D.

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[94] The *pro forma* CMEP, at section 3.3, provides that "Spot Checking may be initiated by the Compliance Enforcement Authority at any time to verify or confirm Self Certifications, Self Reporting, and Periodic Data Submittals."

174. It is also unclear whether NPCC intends the review process for violations which NPCC has described in section 3.0 to be on an ongoing or temporary basis. It appears that the review process described is for routine matters. While there may be more complex and technical matters requiring the expertise of technical committees, we expect compliance staff to be able to make determinations on most routine matters, such as self-certifications, without consultation from others and ultimately to discontinue the technical committee review process. Accordingly, we direct NERC and NPCC to submit, within 60 days of the date of this order, a schedule for ending the technical committee review process or a justification supporting its continuation.

175. In addition, it remains unclear whether the voting protocols applicable to the NPCC hearing body, the NPCC compliance committee, comply with the *April 19 Order*'s directive that each Regional Entity's hearing body render its decisions by a majority of the votes cast by a hearing body quorum.[95] Section VII of the NPCC bylaws provides that the compliance committee will use the quorum and voting rules applicable to the NPCC board, unless otherwise determined by the board, while section VI(E) provides that actions by the board shall be approved upon receipt of a two-thirds affirmative majority of the weighted sector votes. Accordingly, we direct NPCC to modify these provisions or explain the manner and extent to which it has complied with this aspect of the *April 19 Order*. Further, NPCC does not explain how an NPCC compliance staff member may serve as chairman of the NPCC compliance committee that rules on matters brought by the NPCC compliance staff. We direct NPCC to submit a full explanation or amend its Exhibit D accordingly.[96]

176. With respect to Exhibit E, NPCC has failed to include a list of its non-statutory activities or its procedures for ensuring that funding for these activities will be kept separate from funding for statutory activities. NPCC must demonstrate to the Commission how the various funding mechanisms are kept separate. For example, NPCC should address how its bank accounts and receivable/payable procedures are set up for both the statutory and non-statutory functions. In addition, NPCC should ensure that each employee involved in both statutory and non-statutory functions keeps accurate

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[95] *April 19 Order*, 119 FERC ¶ 61,060 at P 151.

[96] *See North American Electric Reliability Corporation*, 119 FERC ¶ 61,248, at P 41-42 (2007) (finding that NERC's director of compliance should be excluded from membership on, or authority to vote in, NERC's stakeholder compliance and certification committee).

timesheets reflecting his or her activities. Moreover, NPCC's proposed revision explaining its fee assessment policy does not address the Commission's directive that NPCC's Exhibit E specify NPCC's procedures for ensuring that non-statutory funding will be kept separate from funding for statutory activities. We direct NERC and NPCC to revise section 5 of the NPCC Exhibit E accordingly.

177. We accept NPCC's proposal that General Members will not be assessed an annual fee. However, NPCC's proposed revision to Exhibit E, which lists the fee assessment policy for Full Members, does not belong in the Delegation Agreement because it addresses a non-statutory obligation. As such, it is not relevant to FPA section 215 and should not be approved as part a delegation of authority by the ERO. Accordingly, we direct NERC and NPCC to remove the fee assessment policy for Full Members from Exhibit E.

4. RFC Delegation Agreement Revisions

a. *April 19 Order*

178. The Commission, in the *April 19* Order, accepted the RFC Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and RFC to make specific changes to the RFC Delegation Agreement.

b. NERC's and RFC's Response

179. RFC and NERC state that the amended and restated RFC Delegation Agreement complies with the directives of the *April 19 Order*. RFC states, among other things, that it has addressed the Commission's concern regarding the use of the term "materiality" in the RFC standards development manual as a necessary characteristic for a Reliability Standard.[97] RFC states that it has eliminated this reference.

c. Commission Determination

180. We accept the amended and restated RFC Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and RFC to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We

[97] *April 19 Order*, 119 FERC ¶ 61,060 at P 341.

also require that NERC and RFC develop certain modifications to their agreement, as discussed below.

181. As noted above, the *April 19 Order* directed NERC and RFC to remove from the RFC Delegation Agreement the requirement of materiality as a condition applicable to the adoption of a Reliability Standard. However, the RFC Standards Development Procedure Manual continues to include this requirement.[98] Accordingly, we require NERC and RFC to revise the RFC manual, consistent with the requirements of the *April 19 Order*.

182. With respect to Exhibit D (Compliance Monitoring and Enforcement), the *April 19 Order* directed NERC and RFC to amend the RFC attachment 2 hearing procedures to identify the RFC hearing body.[99] NERC and RFC address this directive in section 2.0 of the RFC Exhibit D by designating the RFC board compliance committee as the RFC hearing body.

183. In addition, NERC and RFC propose to omit the term "limited liability company" from the definition of the term "person" in the RFC hearing procedures. The RFC Hearing Procedures, as proposed, also provide for the suspension of the procedural schedule in the case of settlement negotiations. In paragraphs 1.4.2 and 1.4.6, RFC removes the *pro forma* requirement that the employment history of a hearing officer and/or technical advisor be disclosed if one is used. NERC and RFC also propose to grant the hearing body the right to submit additional evidence into the record prior to the issuance of a final order in paragraph 1.4.3.

184. The proposed RFC hearing procedures also deviate from *pro forma* paragraph 1.5.7(b)(2) by requiring compliance staff to produce only exculpatory evidence that is "material." In addition, proposed paragraph 1.5.10 (addressing protective orders) removes the requirement that all testimony, exhibits, other evidence, transcripts, comments, briefs, rulings and other issuances are confidential unless NERC or the

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[98] We note that while the term "material to reliability" has been removed from RFC's "Characteristics of a Regional Reliability Standard" section in its Standards Development Procedure Manual, this phrase still exists in RFC's "Definition of a Reliability Standard" on page 3 of its manual.

[99] *April 19 Order*, 119 FERC ¶ 61,060 at P 346.

Commission determine otherwise. NERC and RFC also propose to substitute RFC for the phrase “any Compliance Enforcement Authority” in paragraph 1.5.10(b) where the *pro forma* provision refers to investigative techniques of “any Compliance Enforcement Authority” in the types of information which would be entitled to protection. Under paragraph 1.6.2, “Burden of Proof and Order of Receiving Evidence,” RFC omits the reference to the burden of persuasion in a hearing held in response to a remedial action directive. Lastly, in paragraph 1.6.14, RFC removes the sentence “Each Participant shall have the right to cross examine each witness of any other Participant.”

185. We accept the revised Exhibit D and require modifications. With respect to Exhibit D, we require that section 2.0 be revised. Section 2.0 describes the composition of the RFC hearing body, the board compliance committee (a subcommittee of the RFC board). However, this information is not reflected in the RFC bylaws. We require RFC to amend its bylaws to incorporate the information set forth in section 2.0 on the board compliance committee. Nor does section 2.0 address the voting procedures of the compliance committee, as required by the *April 19 Order*.[100] NERC and RFC must address this issue in the responsive filing to this order.

186. We find unsupported the proposed omission of the term “limited liability company” from the definition of the term “person,” at paragraph 1.1.5 of the RFC hearing procedures. We require that the RFC hearing procedures adopt the *pro forma* term, or justify the proposed deviation.

187. We also require RFC to correct the proposed omission, at paragraph 1.2.12 of the RFC hearing procedures, of the *pro forma* reference to multiple respondents in a single proceeding. This omission is inconsistent with the allowance made at paragraph 1.4.10 of the RFC hearing procedures for the consolidation of proceedings involving different registered entities.

188. We accept paragraphs 1.5.5 and 1.4.2(2), which provide for the suspension of the procedural schedule in the case of settlement negotiations.[101] However, because these

[100] *Id.* P 151 (requiring that the rulings of the hearing body be made by a majority of the votes cast by a quorum of its members).

[101] The NERC hearing procedures also contemplate this right (e.g., paragraph 1.5.5 allows for motions requesting any relief as may be appropriate and paragraph 1.4.2(2) permits a hearing officer to schedule and otherwise regulate the course of the hearing).

provisions make reference to RFC's "settlement procedures," we require that these procedures be enumerated in paragraph 1.5.5.[102]

189. We find unsupported and direct RFC to rectify the proposed deviations from paragraphs 1.4.2 and 1.4.6 of the NERC hearing procedures, by requiring the hearing body to disclose the employment history of a hearing officer and requiring disclosure of similar information about a technical advisor.

190. We accept, subject to clarification, the RFC deviation from paragraph 1.4.2(4), regarding the right of the hearing body to submit additional evidence into the record prior to the issuance of a final order. We clarify that the hearing body's rights are subject to the rights of any participant to: (i) object to the introduction of this evidence, and (ii) present additional responsive evidence. In this regard, the RFC hearing body must permit an adequate time period for participants to make their objections or to present other, related evidence. If the RFC hearing body declines such objections or refuses to admit into the record such evidence, it must explain why. We direct NERC and RFC to amend paragraph 1.4.2(4) accordingly.

191. We accept but direct modification to the proposed deviation from NERC hearing procedures paragraph 1.5.7(b)(2), regarding compliance staff's obligation to produce exculpatory evidence. Under the proposed deviation, RFC compliance staff would be obligated to produce only exculpatory evidence that is "material." However, because materiality in this context is undefined, we direct RFC to address this deficiency.

192. We direct RFC to reinstate the first sentence from paragraph 1.5.10(a) of the NERC hearing procedures addressing protective orders. This sentence describes an important aspect of the hearing procedures: the general, non-public nature of a proceeding. We also direct changes to the proposed deviation from paragraph 1.5.10(b) of the NERC hearing procedures, adding to the list of information that will be considered entitled to protection from disclosure in a protective order, investigative files or documents that would disclose RFC's investigative techniques.[103] We require this

[102] We note that RFC's settlement procedures are also referenced at paragraph 1.8 of the RFC hearing procedures.

[103] The *pro forma* language, by contrast, cites "investigative files or documents that would disclose investigative techniques of Staff, any Compliance Enforcement Authority, the ERO or any federal, state or foreign regulatory authority."

proposed deviation to be modified to: (i) clarify that such files or documents will not ordinarily be discoverable; and (ii) apply to the investigative techniques of any compliance enforcement authority, not only RFC compliance staff.

193. We direct RFC to rectify its proposed deviation from paragraph 1.6.2 of the NERC hearing procedures that would omit a reference to the burden of persuasion in a hearing held in response to a remedial action directive.[104] Because this matter is not addressed elsewhere in the RFC hearing procedures (e.g., it is not discussed in paragraph 1.9, which addresses remedial action directives), we direct RFC to adopt the *pro forma* provision, consistent with the requirements of the *April 19 Order*.[105]

194. Finally, we find unsupported the proposed RFC deviation from paragraph 1.6.14 of the NERC hearing procedures, omitting the reference to the right of participants "to cross-examine each witness of every other Participant." We require that the RFC Hearing Procedures adopt the *pro forma* provision, or support the proposed deviation.

5. SERC Delegation Agreement Revisions

a. *April 19 Order*

195. The Commission, in the *April 19 Order*, accepted the SERC Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and SERC to make specific changes to the SERC Delegation Agreement.

196. With respect to Exhibit B (Governance Structure), the *April 19 Order* rejected SERC's proposal to assess members for the costs of non-statutory activities and held that, in the future, any such fee proposals must be made by SERC in its annual budget and business plan filing. With regard to participation in Reliability Standards development, the *April 19 Order* rejected SERC's reliance on membership as a condition applicable to voting on Reliability Standards. Finally, the *April 19 Order* required that the SERC

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[104] The relevant *pro forma* language, as shown in italics, provides that "[t]he burden of persuasion on the merits of the hearing shall rest upon Compliance Staff alleging noncompliance with a Reliability Standard, proposing a Penalty, opposing a Registered Entity's Mitigation Plan, *or requiring compliance with a Remedial Action Directive*."

[105] *April 19 Order*, 119 FERC ¶ 61,060 at P 146.

Exhibit E (Funding) identify all non-statutory activities, if any, engaged in by SERC and clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities.[106]

b. NERC's and SERC's Response

197. NERC and SERC state that the SERC Delegation Agreement has been revised, consistent with the requirements of the *April 19 Order*. In addition, NERC and SERC state that additional revisions have been made. SERC's Exhibit D, at section 2.0, states that the SERC hearing body will be composed of the SERC board's compliance committee, or a subset of that committee, as appointed by the committee chairman, provided that: (i) the hearing body will comprise a minimum of 50 percent of the committee members or their designated alternates and (ii) no two sectors can control and no one sector can veto the actions of the hearing body.

c. Commission Determination

198. We accept the amended and restated SERC Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and SERC to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and SERC develop certain modifications to their agreement, as discussed below. We accept SERC's proposal to revise its bylaws to: (i) allow SERC to participate in future non-statutory activities; and (ii) submit its proposed non-statutory activities to NERC and the Commission for approval in the annual business plan and budget. However, SERC's proposal to allocate the costs of non-statutory functions to the "beneficiaries" of those functions raises questions as to how the SERC board will determine who is, and who is not, a beneficiary.

199. We direct NERC and SERC to revise section 12.3 of the SERC bylaws to reflect that the allocation of non-statutory costs to members of the Regional Entity will be based on participation in the non-statutory function and will be voluntary. That is, SERC may not condition membership in the Regional Entity or participation in Reliability Standards development process on payment of non-statutory activities, whether or not the member benefits from such activities. Further, in the future when SERC proposes to allocate costs for a non-statutory function, SERC's business plan and budget should include a detailed

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[106] *Id.* P 365-74.

listing and description of the funding sources for its non-statutory activities, as well as a description of the procedures it will use to ensure that the funding of statutory functions will remain separate from non-statutory functions.

200. Moreover, the SERC bylaws do not address or otherwise ensure that the hearing body meets the requirements concerning control by industry sectors. Nor does SERC explain how a subset of the compliance committee would report to the SERC board. Finally, SERC does not show, nor do the SERC bylaws provide, that the hearing body will decide questions in a hearing by a majority of the votes cast by a quorum, as required by the *April 19 Order*. We instruct NERC and SERC to correct these deficiencies.

6. SPP Delegation Agreement Revisions

a. *April 19 Order*

201. The Commission, in the *April 19 Order*, accepted the SPP Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and SPP to make specific changes to the SPP Delegation Agreement.

202. With respect to Exhibit B (Governance Structure), the *April 19 Order* found that the ability of the SPP Regional Entity trustees to act independently of the SPP RTO had not been sufficiently established in matters relating to their appointment and compensation, the preparation and control of budgets, the separation of personnel, the development of Reliability Standards and in other matters subject to the oversight and control of the SPP board. Accordingly, SPP was directed to modify the relevant provisions of its Exhibit B documents to ensure the independence of the SPP Regional Entity trustees *vis a vis* the SPP board.[107] The *April 19 Order* also rejected SPP's proposal to assess members a $6,000 annual fee, noting that SPP, if it wishes, may propose an appropriate fee in its annual budget filing.[108]

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[107] *Id.* P 397-98.

[108] *Id.* P 403 (noting that the SPP Regional Entity trustees must exercise the ultimate control over the standards development process, not the SPP board or the market operations policy committee). *See also Delegation Agreements Rehearing Order*, 120 FERC ¶ 61,260 at P 23 (clarifying that the Commission's earlier determination does not

(continued…)

203. With respect to Exhibit E (Funding), the *April 19 Order* directed NERC and SPP to conform the provisions of that exhibit to the commitment made by SPP in its answer, i.e., to incorporate the cost assignment methodology reflected in the *pro forma* Exhibit E in place of the deviation reflected in the as-filed Exhibit E.[109] The *April 19 Order* also required that the SPP Exhibit E identify all non-statutory activities, if any, engaged in by SPP and clarify how funding of these non-statutory activities will be kept separate from funding of statutory activities. Finally, the *April 19 Order* required that the SPP Exhibit E list data collection as a statutory activity, consistent with the provisions of the *pro forma* Exhibit E.

b. NERC's and SPP's Response

i. SPP Governance

204. NERC and SPP state that the SPP Delegation Agreement, as revised, complies with the requirements of the *April 19 Order*. With respect to the *April 19 Order*'s concern that section 8.3 of the SPP bylaws gives the SPP board the authority to "define" the costs associated with the SPP Regional Entity, NERC and SPP respond that "define," in this context, only means that SPP will clearly set out, or separately delineate, in its annual budget those costs associated with its Regional Entity responsibilities. NERC and SPP assert that the Regional Entity trustees have authority over the contents of the Regional Entity budget.[110] NERC and SPP state that to clarify this point, the word "define" has been changed to "set out" in section 8.3 of the SPP bylaws.

205. With respect to the *April 19 Order*'s concern that the corporate governance committee (a committee that reports directly to the SPP board) has the authority to nominate SPP Regional Entity trustees and to develop criteria regarding the overall composition of the SPP Regional Entity trustees, NERC and SPP assert that the SPP board, in fact, has no direct influence over the composition of this committee and that, as

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preclude SPP from filing a proposal to implement an RTO membership fee pursuant to FPA section 205).

[109] *Id.* P 428.

[110] *See* NERC October 30 Filing at p. 100, *citing* SPP bylaw 9.7.1(f).

such, there should be no independence concerns.[111] NERC and SPP add that this committee's responsibilities are limited to nominating candidates to the SPP membership for consideration and election (a process that occurs during a meeting of members and with no involvement from the SPP board).

206. However, to further ensure the independence of the SPP board and the SPP Regional Entity, NERC and SPP state that section 9.7.9 of the SPP bylaws (addressing compensation issues), has been revised. NERC and SPP state that, previously, section 9.7.9 assigned responsibility for recommending compensation for the Regional Entity trustees to the human resources committee (a committee overseen by the SPP board).[112] NERC and SPP state that, as revised (at section 6.6 and 9.7.9 of the SPP bylaws), this responsibility will be transferred to the corporate governance committee, which will have the responsibility of recommending compensation levels to the SPP membership for its consideration and approval.

207. With respect to the *April 19 Order*'s concerns regarding SPP's quorum and voting requirements (an issue related to Governance Criterion 4, i.e., to the ability of the SPP Regional Entity to assure balance in its decision-making committees and subordinate organizational structures), NERC and SPP respond that SPP's standards development rules require no changes at this time.[113]

208. SPP states that the $6,000 membership fee is for membership in Southwest Power Pool, Inc. and is not required to participate in Regional Entity activities. SPP points out that in the *Delegation Agreements Rehearing Order*, the Commission, without ruling on the merits, clarified that SPP is not precluded from filing a proposal to implement an RTO membership fee pursuant to FPA section 205.[114] SPP states that the Commission

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[111] *Id.* p. 101 (noting that while this committee reports to the SPP board, the majority of its representatives are determined directly by the members of SPP).

[112] The human resources committee is comprised of two independent directors and four stakeholders, each of whom is selected by the corporate governance committee and approved by the SPP board.

[113] The *April 19 Order* noted that SPP's rules, in this regard, appear to meet the Commission's minimum requirements, but should be monitored by NERC regarding their effectiveness. *See April 19 Order*, 119 FERC ¶ 61,060 at P 402.

[114] *See Delegation Agreements Rehearing Order*, 120 FERC ¶ 61,260 at P 17-20.

clarified that only those provisions of the SPP bylaws that relate to the SPP Regional Entity functions require NERC approval. In addition, any other proposed revision to the SPP bylaws which is filed with the Commission pursuant to FPA section 205 or section 206 must be served on NERC in order to provide NERC the opportunity to review the proposed bylaw revision and determine whether it has any ramification for the Regional Entity function and to advise the Commission of any reliability-related issues.[115]

ii. SPP Funding

209. With respect to Exhibit E (Funding), NERC and SPP state that the SPP Delegation Agreement has been revised in conformance with the amended and restated *pro forma* Delegation Agreement. In addition, NERC and SPP state that, consistent with the requirements of the *April 19 Order*, the SPP Exhibit E specifies how funding for SPP's non-statutory activities will be kept separate from funding for statutory activities. SPP has identified data gathering activities as a statutory function and has adopted the new *pro forma* section 5, which addresses the need for procedures for funding non-statutory activities.

210. In addition, SPP proposes additional language for section 5 which identifies SPP as an RTO and lists the primary services provided by the RTO for its members. Section 5 also states that SPP's non-statutory activities are funded separately from its Regional Entity activities through the imposition of a "Commission-approved Tariff Administration Fee" charged by SPP to all load under SPP's Open Access Transmission Tariff, and that SPP's members are assessed an annual membership fee. In addition, SPP points out that Contract Services activities are funded by contract fees.

c. Commission Determination

211. We accept the amended and restated SPP Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and SPP to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and SPP develop certain modifications to their agreement, as discussed below.

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[115] *Id.*

i. SPP Governance

212. We remain concerned regarding the adequacy of the separation of functions between the SPP RTO and SPP Regional Entity. The SPP Regional Entity organizational chart indicates that the SPP Regional Entity employs three full time employees in addition to the Executive Director of Compliance and Enforcement. Other SPP Regional Entity personnel, both professional and administrative, are shared employees with SPP RTO. We are concerned whether the full time staff dedicated to Regional Entity functions can support adequate reliability oversight in the SPP region. Further, we are concerned about whether SPP Regional Entity's reliance on shared professional employees, including engineers and attorneys, and potentially management, allows for a strong separation of functions as contemplated by the Commission in Order No. 672.[116] We have initiated an audit to further inquire into SPP Regional Entity's organizational structure and practices. A final Commission determination regarding the adequacy of the separation of functions between SPP Regional Entity and SPP RTO will remain pending the results of the audit.[117]

213. With respect to SPP's annual membership fee, we accept SPP's statement that this fee is for membership in Southwest Power Pool, Inc. and is not required to participate in Regional Entity activities. To clarify this distinction, we direct SPP to revise its bylaws to explicitly state that membership in the Regional Entity is open to any entity and that SPP will not charge a fee for such participation.

ii. SPP Funding

214. With respect to Exhibit E, SPP: (i) adopts the *pro forma* section 5 language, which addresses the need for procedures for funding non-statutory activities; (ii) explains who will fund non-statutory activities; and (iii) provides a list of its non-statutory activities. However, SPP's proposal to ensure that its non-statutory activities are funded separately from its Regional Entity activities is insufficient. SPP suggests that by imposing a "Commission-approved Tariff Administration Fee" on all load under its Open Access Transmission Tariff, by assessing an annual membership fee on non-statutory

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[116] *See* Order No. 672, FERC Stats & Regs. ¶ 31,204 at P 698-700.

[117] *See* Docket No. PA08-2-000. The scope of the audit is not limited to the matters described in this order.

functions, and by charging contract fees to fund Contract Services activities it satisfies this requirement.

215. We are not convinced that this arrangement explains how the funding sources will be kept separate. Specifically, while this arrangement demonstrates that there will be a distinct source of funding for non-statutory expenses, it does not explain how the funds collected will be kept separate from funds collected under section 215, or identify what accounting or other procedures will be used to ensure that section 215 funds will not be used to cover non-statutory expenses.

216. Accordingly, we direct NERC and SPP to either revise section 5 of Exhibit E to include a list of SPP's specific procedures for ensuring that non-statutory funding will be kept separate from funding for statutory activities, or to provide further explanation demonstrating that SPP's current proposal will accomplish what is required. For example, SPP should address how its bank accounts and receivable/payable procedures are set up for both the statutory and non-statutory functions. In addition, SPP should ensure that each employee involved in both statutory and non-statutory functions keeps accurate timesheets reflecting his or her activities.

7. WECC Delegation Agreement Revisions

a. *April 19 Order*

217. The Commission, in the *April 19 Order*, accepted the WECC Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and WECC to make specific changes to the WECC Delegation Agreement. With respect to Exhibit B (Governance Structure), the *April 19 Order* required WECC to address the lack of separation between its compliance staff and its reliability coordinator function.[118] The *April 19 Order* also required WECC to modify, or eliminate, its annual

[118] *April 19 Order*, 119 FERC ¶ 61,060 at P 453 and P 456 (noting that, if WECC wished, it could use NERC to oversee the compliance and enforcement functions as they relate to WECC's compliance with Reliability Standards).

fees,[119] and rejected WECC's proposal to assess members for the costs of non-statutory activities.[120]

218. With respect to Exhibit C (Reliability Standards Development), the *April 19 Order* held that WECC's reliance on membership as a requirement for voting on Reliability Standards was inconsistent with the Commission's requirement that participation in these matters be open and not require membership.[121]

b. NERC's and WECC's Response

219. NERC and WECC state that the amended and restated WECC Delegation Agreement satisfies the requirements of the *April 19 Order*. With respect to the requirement that WECC's compliance staff and reliability coordinator functions exhibit a sufficient degree of separation, the October 30 filing states that WECC discussed with NERC the possibility of NERC assuming an expanded role regarding WECC compliance monitoring and enforcement matters. NERC explains that it does not currently have the resources with the necessary experience to assume this responsibility. WECC continues to discuss the issue with NERC and explore alternatives to address the Commission's concern.

220. WECC asserts that, until additional measures can be put in place, WECC's existing arrangements are adequate because, among other things: (i) NERC and the Commission receive notice of all allegations of Reliability Standard violations; (ii) NERC and the Commission may participate in WECC investigations; (iii) WECC's oversight of its reliability coordinator functions is subject to NERC and Commission oversight; and (iv) any penalties resulting from WECC reliability coordinator violations will be forwarded to NERC.

221. In response to the *April 19 Order*'s directive regarding membership fees, WECC proposes to revise section 12.2 of its bylaws to eliminate its existing $5,000 fee and to substitute, in its place, a nominal fee. In addition, WECC proposes to revise section 12.3 to state that funding of non-statutory activities will be accomplished through the use of

[119] *Id.* P 458 (noting that an appropriate fee may be proposed in WECC's annual budget filing).

[120] *Id.* P 459.

[121] *Id.* P 469-70.

service fees, charges, or dues applicable to the persons or entities that voluntarily participate in, or voluntarily benefit from, such activities.

222. With respect to Exhibit C, NERC and WECC state that the WECC bylaws have been revised to make clear that "interested stakeholders," as well as WECC members, may participate in the development of and voting on Reliability Standards. WECC defines "interested stakeholder," at section 3.21 of the WECC bylaws, as any entity with "substantial business interests" in the Western Interconnection.

223. With respect to Exhibit D, WECC states that it has developed a separate set of hearing procedures that more closely resemble the Commission's procedural rules than the *pro forma* NERC hearing procedures. These provisions are discussed in greater detail, below. Among other changes, WECC proposes to forego the shortened hearing procedure included in the NERC hearing procedures, asserting that provisions for summary disposition will expedite decisions where there are no factual disputes.

c. Comments

224. Silicon Valley requests clarification regarding WECC's proposed criteria applicable to Class 4 membership. Specifically, Silicon Valley requests that the language limiting Class 4 members to end users of "significant" amounts of electricity or entities that represent a "substantial number" of end users or interested persons be further defined to determine eligibility for Class 4 membership.

d. Commission Determination

225. We accept the amended and restated WECC Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and WECC to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and WECC develop certain modifications to their agreement, as discussed below. Finally, we accept the WECC Bylaws Filing, subject to subsequent membership approval, to become effective 15 days from the date of this order. We also direct certain modifications to the WECC Bylaws.

i. Exhibit B Revisions (Governance Structure)

226. We accept WECC's proposal regarding the separation of its compliance and reliability coordinator functions as an interim measure, i.e., until additional measures can be put in place that will ensure that WECC does not monitor compliance of its own operations. If NERC continues to be unable to assume an expanded role regarding these matters, NERC and WECC will be required to assign this role to: (i) another Regional Entity; or (ii) a third party who reports directly to NERC and who is approved by NERC

and the Commission. We direct NERC and WECC to submit a status report within six months of the date of this order and every six months thereafter, as may be necessary, detailing its efforts to address these requirements. These status reports should include, but not be limited to, a description of any audits conducted by WECC regarding its reliability coordinator functions and a summary of the results of the audits.

227. WECC's proposal to allocate the costs of non-statutory functions to entities that voluntarily "benefit" from these functions requires clarification. Accordingly, we direct NERC and WECC to revise section 12.3 of the WECC bylaws to reflect that the allocation of these costs will be based on the voluntary participation in these non-statutory functions. That is, WECC may not condition membership in the Regional Entity on payment of non-statutory activities, whether or not the member benefits from such activities.

228. We reject Silicon Valley's request for clarification regarding the qualifications for membership as a Class 4 end user. We are not persuaded that clarification regarding this classification is necessary at this time. Should a dispute arise over a particular assignment to a membership class, we will apply our judgment at that time, as may be necessary.

ii. WECC Exhibit C (Reliability Standards Development)

229. WECC has generally complied with the requirement of the *April 19 Order* regarding the right of non-members to participate in the reliability standards development process. However, we reject, as unnecessary, WECC's proposed definition of "interested stakeholder." WECC's proposed definition would prohibit participation in the reliability standards development process unless a stakeholder can establish that it has a "substantial business interest." However, the term "interested stakeholder" is sufficient in this regard.

iii. WECC Exhibit D (Compliance Monitoring and Enforcement)

230. We accept, subject to conditions, WECC's justification for its proposed deviation regarding the omission of NERC's shortened hearing procedures (*see* NERC hearing procedures, paragraph 1.3.2). Because this deviation represents a significant change from the NERC hearing procedures, we require NERC and WECC to submit a report, by June 30, 2009, addressing the merits of retaining this deviation.

231. We find unsupported proposed deviations that omit from the WECC hearing procedures the two standard interpretative principles set forth at paragraphs 1.1.4(b) and (c) of the NERC hearing procedures. *Pro forma* paragraph 1.1.4(b) provides that unless

the context otherwise requires, the singular of a term includes the plural and the plural of a term includes the singular. *Pro forma* paragraph 1.1.4(c) provides that the text of a rule shall control to the extent that it is inconsistent with the rule's caption. We direct WECC to adopt the *pro forma* language or support its proposed deviation.

232. We also require WECC to revise its proposed deviation from paragraph 1.1.3 of the NERC hearing procedures. WECC's proposal to substitute "party" for the *pro forma* term "participant" narrows the class of persons this provision would cover to WECC's compliance staff and the registered entity, i.e., the entities identified as "parties" in WECC paragraph 1.7.1 (thus excluding other entities the Commission may permit to participate). We require that WECC's paragraph 1.1.3, "Standards for Discretion", be revised to cover all entities meeting the *pro forma* definition of participant. Similarly, WECC proposes additional provisions addressing the requirements or rights of parties.[122] WECC does not state whether other persons that the Commission authorizes to participate in a proceeding will be subject to these provisions. Accordingly, we direct WECC to revise its procedures to clarify these rights.

233. We require WECC to revise proposed paragraph 1.4.1(b) (addressing compliance staff's obligation to produce exculpatory evidence).[123] As we held above in discussing the comparable *pro forma* provision (*pro forma* paragraph 1.5.7(b)(2)), WECC compliance staff's obligation to produce material exculpatory evidence must be subject to (and thus limited by) any applicable privilege that may apply. WECC paragraph 1.4.1(b)(2) is required to reflect this limitation. WECC must also explain why compliance staff's obligation to produce material exculpatory evidence, at paragraph 1.4.1(b)(3), should extend to documents not otherwise discoverable or not otherwise

[122] For example, WECC's proposed paragraph 1.3.6 states that a party may be required to submit a memorandum prior to an evidentiary hearing describing the party's position, while proposed paragraph 1.3.4 states that parties may seek interlocutory review of any ruling by a hearing officer.

[123] Paragraph 1.4.1(b)(2) requires compliance staff to make available "material exculpatory evidence" in certain documents for which staff could assert a privilege. Paragraph 1.4.1(b)(3) requires compliance staff to make available material exculpatory evidence in documents that otherwise are not discoverable pursuant to the Federal Rules of Civil Procedure and not necessary for a complete record.

needed for a complete record. We also direct WECC to clarify the meaning of the term "material" exculpatory evidence in the context of its proposed paragraph 1.4.1.

234. We require WECC to revise paragraph 1.6.2 (addressing NERC's obligation, in the case of an appeal, to request certain portions of the record from WECC's clerk). Because WECC's requirement may impede or delay NERC's review, we direct WECC to revise paragraph 1.6.2 to provide that WECC's clerk shall submit the full record to NERC.

235. WECC's proposed paragraph 1.8.1, allowing for waiver of the quorum requirement applicable to the actions of a hearing panel, is inconsistent with the *April 19 Order*.[124] However, we accept this provision, subject to conditions, as it relates to the selection of a hearing panel. Paragraph 1.8.1 provides that the hearing panel will be selected from WECC's compliance hearing body, pursuant to WECC's compliance hearing body charter, and that no two industry segments may control, and no single industry segment may veto, any decision by the hearing panel. The compliance hearing body charter, though, does not describe how these requirements will be met.[125] Accordingly, we require WECC to revise its hearing body charter to address these matters.

[124] *April 19 Order*, 119 FERC ¶ 61,060 at P 151.

[125] The compliance hearing body charter identifies Class A and Class B members. Class A members are WECC non-affiliated directors, independent consultants, and personnel employed by WECC members who are not engaged in the generation, transmission, distribution or trading of electricity or the provision of related energy services in the Western Interconnection. Class B members are personnel employed by WECC members who are engaged in the generation, transmission, distribution or trading of electricity or the provision of related energy services in the Western Interconnection. The hearing body charter is designed to produce a hearing body comprised of three Class A members and two Class B members (a five-member panel), or two Class A members and one Class B member (a three-member panel). However, in the event a sufficient number of Class A members is unavailable, a panel may be selected with a three-to-two, or two-to-one, majority of Class B members. In this circumstance, Class B members could collectively control a hearing panel and be drawn from one or two industry segments.

236. We also require that WECC revise proposed paragraph 1.8.6, which would permit a hearing officer to decide a motion regarding his or her qualifications to serve as the hearing office, and permit a member of a hearing body to participate in a ruling on a motion regarding his or her qualifications to serve on the hearing body. *Pro forma* paragraph 1.4.5 specifies that a hearing body decides a motion for disqualification of a hearing officer, and that a member of a hearing body may not participate in deciding a motion for his or her disqualification. We are not persuaded that a deviation from this requirement is warranted in the case of WECC.

237. Finally, we require WECC to revise its proposed paragraph 1.9.1, regarding the notice requirements applicable to the issuance of a remedial action directive.[126] Paragraph 1.9.1 fails to ensure that a registered entity will receive a remedial action directive on the date of its issuance. Accordingly, we require WECC to revise paragraph 1.9.1 to ensure that the registered entity actually receives a remedial action directive on the day that WECC's compliance staff issues it, or that the period for the registered entity to contest the directive will begin on the date that the registered entity actually receives it. To align the time period for contesting a WECC remedial action directive with that required by other Regional Entities, we require WECC to amend paragraph 1.9.1. to provide that a registered entity has two business days, rather than two days, from actual receipt of the directive to contest it.

iv. <u>WECC Exhibit E (Funding)</u>

238. We reject, as unsupported,, the WECC Exhibit E omission, at section 3(b), of the following *pro forma* provision: "[u]pon approval of the annual funding requirements by applicable governmental authorities, NERC shall fund [Regional Entity's] costs identified in this Exhibit E in four equal quarterly payments." We direct NERC and WECC to adopt this language.

[126] Paragraph 1.9.1 provides that WECC's compliance staff will provide notice of a remedial action directive by electronic mail and by either personal delivery or express courier. Paragraph 1.9.1 further provides that the registered entity must notify WECC that it contests the directive within two days following electronic mail issuance of the directive, or the registered entity will be deemed to have waived its right to contest the directive.

8. <u>FRCC Delegation Agreement Revisions</u>

a. ***<u>April 19 Order</u>***

239. The Commission, in the *April 19 Order*, accepted the FRCC Delegation Agreement. The Commission also directed changes consistent with the required revisions to NERC's *pro forma* documents. In addition, the *April 19 Order* directed NERC and FRCC to make specific changes to the FRCC Delegation Agreement.

240. With respect to Exhibit B (Governance Structure), the *April 19 Order* required FRCC to modify its provision pursuant to which all members are assessed for the costs of FRCC's non-statutory activities.[127] In addition, the *April 19 Order* required FRCC to modify its provision pursuant to which it assesses affiliate and adjunct members a $5,000 annual fee.[128]

241. With respect to Exhibit D (Compliance Monitoring and Enforcement), the *April 19 Order* required that in the case of a notice of alleged violation proposed to be issued to a particular registered entity, no member of the FRCC compliance committee who is employed by, or has a financial or other interest in the registered entity, or any of its affiliates, may participate in the review.[129] The *April 19 Order* further held that FRCC's CMEP failed to identify the number of votes required to carry a hearing body vote if quorum of the FRCC board compliance committee, but not its full membership, serves as a the hearing body in a given case.

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[127] *April 19 Order*, 119 FERC ¶ 61,060 at P 552 (noting that while it would be improper to require interested stakeholders to fund non-statutory activities, as a condition to their membership in FRCC, FRCC may collect funds through other means, such as user fees, or may charge special membership fees to those who either choose or are required to participate in non-FPA section 215 activities).

[128] *Id.* (noting that Regional Entities may assess nominal membership fees in their annual budget filings).

[129] *Id.* P 575.

242. With respect to Exhibit E (Funding), the *April 19 Order* required FRCC to identify, in its Exhibit E, its non-statutory activities, if any, and to address how funding of these activities will be kept separate from funding of statutory activities.[130]

b. NERC's and FRCC's Response

243. NERC and FRCC state that the amended and restated FRCC Delegation Agreement complies with the *April 19 Order*. With respect to the *April 19 Order*'s requirement that FRCC demonstrate a strong separation of functions, as between its Regional Entity functions and its reliability coordinator functions, NERC and FRCC state that FRCC has requested, and NERC has agreed, to perform the monitoring and enforcement responsibility for the functions for which FRCC is a registered entity.

244. With respect to the *April 19 Order*'s directive that FRCC modify its proposal to assess all members for the costs of non-statutory activities, NERC and FRCC state that the FRCC bylaws have been modified to provide for two types of membership: Regional Entity membership and Services Member membership. NERC and FRCC point out that there will be no cost to join as a Regional Entity member.

245. With respect to the *April 19 Order*'s requirement barring any entity that is employed by, or has a financial or other interest in, the registered entity or any of its affiliates from participating in the FRCC compliance committee review process, NERC and FRCC state that section 3.0 of the FRCC CMEP has been revised to remove the FRCC compliance committee's ability to approve penalties. In addition, NERC and FRCC state that section 3.0, as revised, prohibits the participation of a member of the compliance committee where that member is employed by, or has a financial or other interest in, the subject registered entity or any of its affiliates.

246. With respect to the *April 19 Order*'s requirement that the voting procedures applicable to the FRCC hearing body be clarified, NERC and FRCC states that paragraph 1.7.8 of the FRCC hearing procedures specifies the number of votes required to carry the vote if only a quorum of hearing body members, rather than the full number of hearing body members, conduct and vote on a particular hearing. NERC and FRCC also state that paragraph 1.9.2 of the FRCC hearing procedures specifies that the full hearing procedures are applicable to the expedited remedial action directive hearing unless the context of a provision is inconsistent with or otherwise renders it inapplicable to the

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[130] *Id.* P 589.

specific procedures for the expedited remedial action directive hearing. NERC and FRCC state that, as such, the voting requirements are those specified in paragraph 1.7.8.

247. With respect to the requirement that the FRCC Exhibit E list FRCC's non-statutory activities and address how these activities will be kept separate from FRCC's statutory activities, NERC and FRCC state that FRCC's Exhibit E has been revised to conform with NERC's *pro forma* Exhibit E, section 5. Specifically, NERC and FRCC state that the FRCC section 5 language specifies that if FRCC performs any non-statutory functions, it will first provide its budget for, a detailed listing of, and a description of the funding sources or, the non-statutory activities in its annual business plan and budget submission to NERC, as well as a description of the procedures FRCC will use to ensure funding of statutory activities. NERC and FRCC assert that the annual business plan and budget is a more appropriate document to list and discuss any non-statutory functions because these functions are subject to change on an annual basis.

248. In addition to the changes mandated by the *April 19 Order*, the FRCC Delegation Agreement has also been revised to include other changes. Among other things, the FRCC base Delegation Agreement has been revised, at section 5(b), to incorporate a NERC *pro forma* provision applicable to Regional Entities organized on an Interconnection-wide basis. The FRCC provision proposes, in relevant part, that "NERC shall rebuttably presume that a proposal from a Regional Entity for a Regional Reliability Standard is just, reasonable, and not unduly discriminatory or preferential, and in the public interest."

c. Commission Determination

249. We accept the amended and restated FRCC Delegation Agreement, to become effective 15 days from the date of this order. In addition, we direct NERC and FRCC to revise their agreement, within 120 days of the date of this order, consistent with the modifications to the *pro forma* Delegation Agreement discussed earlier in this order. We also require that NERC and FRCC develop certain modifications to their agreement, as discussed below.

250. First, we reject section 5(b) of the FRCC base Delegation Agreement. While this provision purports to adopt the NERC *pro forma* provision, the *pro forma* language of

section 5(b), on its face, applies only to a Regional Entity that has been organized on an Interconnection-wide basis.[131] FRCC is not organized on an Interconnection-wide basis.

251. While we accept that FRCC membership is open to any entity, without cost, the FRCC bylaws and the FRCC Delegation Agreement should be revised to make this commitment express. Currently, the FRCC bylaws make reference to an annual fee of $5,000 for "Affiliate" and "Adjunct Members."[132] It is unclear, however, if this applies to Regional Entity membership or only to "service members" who are also affiliate or adjunct members.

252. With respect to FRCC's CMEP, section 3.0 describes how the FRCC stakeholder compliance committee will assist FRCC compliance staff in determining whether to issue a notice of alleged violation. FRCC asserts that the stakeholder compliance committee has technical expertise and experience to assist FRCC compliance staff. The Commission approved use of the stakeholder compliance committee as a transitional tool to assist FRCC in light of FRCC's traditional use of industry volunteers and recent turnovers in FRCC compliance staff.[133] We believe that these rationales will become less relevant as FRCC staff increases in number and gains experience. Accordingly, we direct NERC and FRCC to submit, within 60 days of the date of this order, a schedule for ending the stakeholder compliance committee review process, or a justification supporting its proposed continuation.

253. In addition, FRCC has not demonstrated that its hearing body, the FRCC board compliance committee, acts by a majority of the votes of its members when a quorum is present.[134] Although NERC and FRCC include provisions to this effect in section 2.0 of

[131] *See also* FPA section 215(d)(3) (requiring the ERO to rebuttably presume that a proposal for a Reliability Standard or modification to a Reliability Standard applicable on an Interconnection-wide basis is just, reasonable, and not unduly discriminatory or preferential, and in the public interest *if* the Regional Entity is organized on an Interconnection-wide basis).

[132] FRCC bylaws, article I, section 1.8(b) and article VI, section 6.2(b)(ii-iii).

[133] *April 19 Order*, 119 FERC ¶ 61,060 at P 574.

[134] *Id.* P 151.

the FRCC CMEP[135] and paragraphs 1.7.8 and 1.9.2 of the FRCC hearing procedures, FRCC's bylaws appear to set a different standard for action by the board compliance committee. Specifically, section 5.4 of the FRCC bylaws lists the board compliance committee as a standing committee of the FRCC board. In turn, section 5.7 provides that action by a standing committee requires an affirmative vote equal to or greater than sixty percent of the total eligible voting strength of the standing committee. Accordingly, we direct FRCC to show how the board compliance committee will meet the majority vote criterion for actions it takes as FRCC's hearing body and expedited hearing body or, if not, how FRCC will restructure the board compliance committee or select another hearing body to do so.

254. With respect to Exhibit E (Funding), the *April 19 Order* directed FRCC to identify non-statutory activities performed by FRCC and address how the funding of any such activities will be kept separate from the funding of FRCC's statutory activities. In response, FRCC proposes to adopt NERC's proposed *pro forma* language at Exhibit E, section 5 (requiring FRCC to provide to NERC, on an annual basis, its budget and its description for its non-statutory activities, if any), and to utilize its annual budget filing as the proceeding in which it will identify and address matters relating to these activities.[136] FRCC interprets Exhibit E, section 5 to be consistent with its position that its annual business plan and budget filing provides the appropriate forum to list and explain any non-statutory functions in which it may be engaged. FRCC notes that these functions are subject to change and, if included in the FRCC Exhibit E, could require multiple or otherwise unnecessary amendments to the FRCC Delegation Agreement.

255. We reject FRCC's proposed interpretation of Exhibit E, section 5. First, FRCC's argument is a collateral attack on the *April 19 Order*. In that order, the Commission

[135] Specifically, section 2.0 of FRCC's Exhibit B states, "decisions of [the board compliance committee] shall require (i) a quorum to be present requiring at least fifty (50) percent of the number of members assigned to [the committee] and (ii) a majority vote of the members of [the committee] voting on the decision."

[136] As noted above, we accept NERC's *pro forma* section 5 language, subject to the clarification that this provision does not exempt the Regional Entities from the requirements of the *April 19 Order* regarding the need of each Regional Entity to revise its Exhibit E representations, as necessary, to: (i) identify any non-statutory activities in which it may be engaged; and (ii) address how the funding of any such activity will be kept separate from the funding of statutory activities. *See supra* section IV.C.4.

directed NERC and FRCC to revise Exhibit E to identify non-statutory activities and indicate how funding of these non-statutory activities will be kept separate from funding of statutory activities. Further, we do not expect a Regional Entity to constantly change the nature or scope of its non-statutory functions and do not anticipate constant revisions to Exhibit E. However, if a Regional Entity does propose to change the nature or scope of its non-statutory activities, the Commission needs to be given notice of that change. A filing seeking a proposed revision to Exhibit E, the Commission has determined, offers an appropriate forum for considering such a change.

256. Accordingly, we direct NERC and FRCC to revise and/or supplement Exhibit E, section 5, consistent with the requirements of the *April 19 Order*. In that submission, FRCC must demonstrate to the Commission how its various funding mechanisms are kept separate. For example, FRCC should address how its bank accounts and receivable/payable procedures are set up for both the statutory and non-statutory functions. In addition, FRCC should ensure that each employee involved in both statutory and non-statutory functions keeps accurate timesheets reflecting his or her activities.

The Commission orders:

(A) NERC's October 30 Filing is hereby accepted, to become effective 15 days from the date of this order.

(B) NERC and, as appropriate, its Regional Entities, are hereby directed to make a compliance filing within 120 days of the date of this order, as discussed in the body of this order

(C) The WECC Bylaws filing is hereby accepted, subject to subject membership approval, to become effective 15 days from the date of this order. We also direct certain modification to the WECC Bylaws within 120 days of the date of this order, as discussed in the body of this order.

(D) NERC and NPCC are hereby directed to submit a report within 60 days of the date of this order outlining their proposed termination of the technical committee review process or, in the alternative, justifying its continuation, as discussed in the body of this order.

(E) NERC and WECC are hereby directed to submit a status report by June 30, 2009 addressing the merits of retaining their proposed deviation from paragraph 1.3.2 of the *pro forma* NERC hearing procedures, i.e., their proposal to forego use of NERC's shortened hearing procedures, as discussed in the body of this order.

(F) NERC and WECC are hereby directed to submit a status report within six months of the date of this order, and every six months thereafter, addressing WECC's monitoring and enforcement responsibilities regarding its reliability coordinator function. This reporting requirement shall apply until such time as WECC establishes alternative measures. As discussed in the body of this order, the required status reports must address, among other things, any audit findings relating to WECC's reliability coordinator functions.

(G) NERC and FRCC are hereby directed to submit a report within 60 days of the date of this order outlining their proposed termination of the stakeholder compliance committee review process or, in the alternative, justifying its continuation, as discussed in the body of this order.

By the Commission.

(S E A L)

Kimberly D. Bose,
Secretary.